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We took occasion to refer in our issue of Sep. 13th, to the decision of Division No. 2 of the Supreme Court of Missouri in the case of Millar v. Madison Car Co., 31 S. W. Rep. 574. The construction of the Act of April 18, 1891, securing the right of appeal from an order granting a new trial as made by the court, was a surprise to the bench and the bar. The same division has since that time reaffirmed the Millar case in the case of Candee v. K. C. & I. Rapid Transit Co., 31 S. W. Rep. 1029. The court seems to think that a party can except to a ruling in his favor, and that he may file a bill of exceptions and get the judgment of the appellate court, by means of a cross-appeal. This puts a new element into trial and appellate practice not heretofore known, a matter that cannot be readily understood without greater elucidation from the Supreme Court. Both the Millar case and the Candee case stand alone in the books as requiring the appellee to show that no error was committed by the trial court, in place of the appellant being required affirmatively to show that error had been committed. The case of Kreis v. Mo. Pac. Ry. Co., under consideration by the Supreme Court *in banc*, in one or more aspects presents the same questions as were determined by Division No. 2 in the cases just referred to. It will be a relief to the trial judges as well as to the bar to know what the Supreme Court *in banc*, will do respecting these two important questions. If the Supreme Court follows Division No. 2 and decides a case upon the correctness or incorrectness of the reasons given by the trial court for making an order and not upon the order itself, it will be very difficult to know just where the matter will end. If the Supreme Court will adhere to the position taken by Division No. 2 that a cross-appeal can be taken or that the appellee must show that the trial court did not err, a new element in appellate practice will have been originated.

Whether an appeal will lie to the Supreme Court of the United States in patent cases has been a more or less disputed question since the passage of the act establishing Circuit Courts of Appeal. That such appeal is permissible has recently been decided by the United States Supreme Court in the suit brought by the United States against the Bell Telephone Co. to cancel the Berliner patent, wherein the jurisdiction of the court over patent cases is examined. The defendant, in the case referred to, moved to dismiss the appeal on the ground that under the act establishing the Circuit Courts of Appeal the Supreme Court was given no jurisdiction, because the case was one arising under the patent laws of the United States, and that judgments in such cases are made final. The government opposed this contention on the ground that the act gave the right of appeal in cases where the United States was a party. Chief Justice Fuller, in deciding in favor of the contention of the government, said that the object of the act establishing the Circuit Courts of Appeal was to relieve the Supreme Court of the overburden of cases and controversies arising from the rapid growth of the country and the steady increase of litigation, and added: "Judgments or decrees in cases in which the ground of jurisdiction of the Circuit Court is that the United States are plaintiffs or petitioners are not made final in terms, and such cases would fall within the last paragraph, unless restricted by the previous enumeration. And the contention is that the words 'cases arising under the patent laws' must be held to operate as such restriction, and to render the judgments and decrees of the Circuit Court of Appeals final, notwithstanding the existence of another distinct ground of jurisdiction in the Circuit Court, and that there would, consequently, be a right of appeal from a decree of a Circuit Court of Appeals dismissing a bill by the United States to cancel a patent for land obtained by fraud, but none where the bill was one to repeal an invention patent so obtained. * * * In instituting this case the government appeared on behalf of the public, and, as it were, in the exercise of the function of superintending authority over the public interests, and the rule of construction in such cases is properly regarded as affected by considerations of public policy. * * * So much of the royal prerogative as belonged to the king in his position as universal trustee

enters as much into the principles of our State as it does into the principles of British government. Hence it was held in The United States v. Beebe (127 U. S.), that the United States are not bound by any statute of limitations nor barred by laches of their officers in a suit brought by them, as sovereign, to enforce a public right or to assert a public interest."

The substance of the court's conclusion was that in the United States, where there is no kingly prerogative, but where patents for land or inventions are issued by the authority of the government and by officers appointed for that purpose, who may have been imposed upon by fraud or deceit, or may have erred as to their power or made mistakes in the instrument itself, the appropriate remedy is by proceedings by the United States against the patentee. The court, he said, could not impute to congress the intention of narrowing the appellate jurisdiction of the court in a suit brought by the United States as a sovereign in respect of alleged miscarriage in the exercise of one of its functions, as such deeply concerning the public interests, and not falling within the reason of the limitations of the act.

NOTES OF RECENT DECISIONS.

MUNICIPAL CORPORATION—ANNEXATION OF TERRITORY—COLLATERAL ATTACK.—The Supreme Court of Washington decides, in Kuhn v. City of Port Townsend, that the legality of proceedings by which territory was annexed to a city cannot be questioned in an action to restrain the collection of taxes, and that where a city has by statutory proceedings annexed and assumed jurisdiction over adjacent territory, one who petitioned for the annexation, and accepted the benefits of improvements, cannot, after the lapse of four years, question the jurisdiction of the city to assess taxes against a part of the annexed territory belonging to him. The court says:

Upon the facts above noticed, we think the judgment appealed from must be affirmed for two principal reasons, viz.: (1) A private citizen cannot question the right of a municipal corporation to exercise the authority, powers, and functions of an incorporated city. This can be done only in a direct proceeding, prosecuted by the proper public officers of the State. (2) The appellant is precluded by his conduct from maintaining the present action. The following authorities, and many others that might be cited, support the first proposition above laid down: Voss v. School Dist., 18 Kan. 467; School Dist. No. 25 v. State, 29 Kan. 57; Graham v. City of Greenville (Tex. Sup.), 2 S. W. Rep. 742; Stockle v. Silsbee, 41 Mich. 615, 2 N. W. Rep. 900; Clement v. Everest, 29 Mich. 19; Mullikin v. City of Bloomington, 72 Ind. 161; Railroad Co. v. Wilson (Kan.), 6 Pac. Rep. 281. In the case last above cited the court say: "To maintain this suit, and to defeat the tax complained of, the plaintiff must establish, and the court must determine, that the organization of the district is illegal. This cannot be done in the present action. The legality of the organization cannot be questioned in a collateral proceeding, nor at the suit of a private party. The organization cannot be attacked, nor any action taken affecting the existence of the corporation, except in a direct proceeding, prosecuted at the instance of the State by the proper public officer." In Clement v. Everest, *supra*, it is said: "It would be dangerous and wrong to permit the existence of municipalities to depend on the result of private litigation. Irregularities are common and unavoidable in the organization of such bodies; and both law and policy require that they shall not be disturbed, except by some direct process, authorized by law, and then only for very grave reasons." In Mullikin v. City of Bloomington, *supra*, the court say: "As there is a statute under which the town might have become a city, and the complaint shows an attempt to comply with this statute, and shows also acts performed, after such attempt (conceding that the statute was not strictly complied with), as a city corporation, and that powers were asserted under the general act for the incorporation of cities, a citizen, in his own behalf, cannot attack the right of the corporation to exercise the functions, powers, and authority of an incorporated city. In such cases as the present the right to exercise the powers and authority of a corporation can only be questioned by a proceeding in the nature of a *quo warranto*, filed by some one possessing competent authority, in behalf of the State." Without multiplying authorities upon a proposition so generally recognized and understood, we think it can be safely said that, where the legislature has conferred upon a city the power to enlarge its corporate limits, and, having jurisdiction of the general subject-matter thereof, the city authorities proceed to act and to declare a result, and thereafter to act upon such result, the legality of such acts cannot be called in question in a collateral proceeding. So here the subject of annexing territory to the city was one over which the council of the city of Port Townsend had jurisdiction by virtue of section 9 of the act of 1890, *supra*. That jurisdiction was brought into exercise by the filing of the petition, regardless of whether the petition complied with the statute, and regardless of any errors or irregularities in the proceedings of the council. "The power to hear and determine a case is juridiction; it is *'coram judice'* whenever a case is presented which brings this power into action." U. S. v. Arredondo, 6 Pet. 691. In Morrow v. Weed, 4 Iowa, 77, it was held: "If there be a petition, or the proper matter of that nature, to call into action the power or jurisdiction of the court, its sufficiency cannot be called in question in a collateral proceeding." To the same effect is the very well considered case of City of Terre Haute v. Beach, 96 Ind. 143. The objections urged against the proceedings of the council of the respondent city do not go to any question of jurisdiction, but constitute mainly irregularities and informalities not affecting

jurisdiction, and afford no ground for collateral attack.

The appellant's participation in the annexation proceedings, his subsequent recognition of the jurisdiction of the city authorities, his acquiescence in the result reached and declared by them, and his gross laches in the assertion of his rights, constitute an equitable bar to the cause of action which he, after the lapse of nearly three years, first attempted to assert; and it would be immaterial to the result were we to determine that his conduct amounted to a ratification, or an election, or requires the application of the doctrine of estoppel. Strosser v. City of Ft. Wayne, 100 Ind. 443; Hayward v. Bank, 96 U. S. 611; Graham v. City of Greenville, *supra*. In Strosser v. City of Ft. Wayne, *supra*, it is said: "If a taxpayer were permitted to long acquiesce in the order of annexation, and then secure its overthrow, great confusion would ensue, and much injustice be often done. High considerations of public policy and of justice require that a taxpayer who is notified that a public corporation claims to have extended its limits so as to take in his property should act with promptness, and proceed with diligence, if he would resist the attempted annexation."

CRIMINAL LAW—HOMICIDE—DATE OF OFFENSE.—An interesting question of criminal law was involved in the decision of the case of Debney v. State, by the Supreme Court of Nebraska, the holding of the court being that the crime of murder is regarded as having been committed at the time when the fatal blow or wound is inflicted, although the death occurs on a subsequent date; and the party is to be tried by the laws in force at the time the injurious act is done. The court thus reviews the authorities on the subject:

The first question argued by counsel is whether the accused was entitled to the benefit of the amendment to section 3 of the Criminal Code adopted by the legislature of 1893, fixing the punishment for murder in the first degree, at death or imprisonment in the penitentiary for life, in the discretion of the jury. The act of the legislature containing the aforesaid amendment to the Criminal Code contained no emergency clause. Therefore, under the provisions of section 24, art. 3, of the State constitution, it did not become operative until three calendar months after the adjournment of the session of the legislature at which it was enacted. The twenty-third legislative assembly finally adjourned on the 8th day of April, 1893, and it is contended by counsel for plaintiff in error that the act to which reference is made above went into effect at the expiration of three calendar months from such adjournment, or on July 9, 1893, the day on which the death of Mrs. Debney occurred. On the other hand, the attorney general argues that the amendment did not go into effect until August 1, 1893; in other words, that the "three calendar months" begins to run at the expiration of the month within which the legislature adjourned *sine die*. In our view, it is unnecessary—indeed, it would be quite out of place—to decide at this time between these conflicting positions of counsel, or to review their arguments or the authorities cited in support thereof, since the time when the amendment of 1893 to section 3 of the Criminal Code went into force does not on the record arise in this case, unless the crime with which the plaintiff in error is called upon to answer was committed on July 9th, the day Mrs. Debney died, and not on the 4th day of the same month, when the fatal wounds were inflicted. Undoubtedly, the concurrence of both the wounds and the consequent death were necessary for the consummation of the crime of murder, for, until death ensues, the crime is not complete. The question has been frequently before the courts for adjudication, where is the crime committed when the wounds or blows, and the death resulting therefrom, occur in different counties or States? And the great weight of the decisions holds that, independent of any statutory provision upon the subject, the crime is committed and is punishable in the jurisdiction where the fatal wound or blow is given; in other words, that it is not the place of the death, but the place where the criminal act is perpetrated, to which the jurisdiction to try and punish is given. It was the inflicting of the fatal wounds by the prisoner, coupled with the requisite contemporaneous intent or design, which constituted the felony; the subsequent death of Mrs. Debney being a result or sequence rather than a constituent element of the offense. The doctrine is stated thus by Mr. Bishop, at section 51 of volume 1 of his work on Criminal Procedure: "The true view appears to be that the blow is murder or not, according as it produces death within a year and a day or not; and therefore, in all cases, an indictment lies in the county where the blow was given." To the same effect, see 1 Whart. Cr. Law, 292; Kerr, Hom. § 226; Rex v. Hargrave, 5 Car. & P. 170; Green v. State, 66 Ala. 44; State v. McCoy, 8 Rob. (La.) 545.

In Riley v. State, 9 Humph. 646, it was held that the venue is proved in a murder case by establishing that the mortal blow was inflicted in the county in which the prosecution is brought, without proving the county where the deceased died. Green, J., in delivering the opinion of the court, says: "For, although, at common law, it was said the offense was not complete until death, yet it would be doing violence to language to say that the offense was committed in the county where the death happened, although the strokes were given in another county. . . . East says the common opinion was that he might be indicted where the stroke was given. That alone is the act of the party. He commits this act and the death is only a consequence."

U. S. v. Guiteau, 1 Mackey, 498, was a prosecution for the murder of President Garfield. In that case the fatal shot was fired in Washington, in the District of Columbia from which the president died three months later, at Elberon, in the State of New Jersey. Guiteau was indicted and tried for the crime in the District of Columbia. The point was made in the case that the court had no jurisdiction, on the ground the crime was committed at the place where the death occurred. The court, in an opinion by Justice James, held that the murder was committed within the District of Columbia, since the fatal wound was given there, although the consequent death happened without the district, and in one of the States.

State v. Kelly, 76 Me. 331, was a prosecution for murder. The wound which produced the death was inflicted within the limits of Ft. Papham, a fort of the United States, from the effects of which wound death ensued at Phipsburg, outside the limits of the fort. It was held the crime was committed where the mortal blow was given, and not where the person died. The court, in the opinion, observe: "But it is

said that, although a mortal wound may be inflicted within a fort, still, if the person wounded dies elsewhere, the crime must not be regarded as having been committed in the fort, but at the place where the person dies, and that in such a case the courts of the latter place have jurisdiction. It is undoubtedly true that the courts of the latter place do sometimes have jurisdiction; but we are satisfied that, when this is so, it is not because the crime is regarded as having been committed there, but because some rule of law, statutory or otherwise, expressly confers such jurisdiction. The modern and more rational view is that the crime is committed where the unlawful act is done, and that the subsequent death, while it may be sufficient to confer jurisdiction, cannot change the locality of the crime."

State v. Carter, 27 N. J. Law, 499, was an indictment for murder. The blows were struck in Hudson county, N. Y., from which the injured party died in New Jersey, where the prosecution was brought. Vanderburgh, J., in speaking for the court upon the question of jurisdiction, uses this language: "The only fact connected with the offense alleged to have taken place within our jurisdiction is that, after the injury, the deceased came into and died in this State. This is not the case where a man stands on the New York side of the line, and, shooting across the border, kills one in New Jersey. When that is so, the blow is in fact struck in New Jersey. It is the defendant's act in this State. The passage of the ball after it crosses the boundary, and its actual striking, is the continuous act of the defendant. In all cases the criminal act is the impinging of the weapon, whatever it may be, on the person of the party injured, and that must necessarily be where the impingement happens. And whether the sword, the ball, or any other missile passes over a boundary in the act of striking, is a matter of no consequence. The act is where it strikes, as much where the party who strikes stands out of the State as where he stands in it. Here no act is done in this State by the defendant. He sent no missile or letter or message that operated as an act within this State. The coming of the party injured into this State afterwards was his own voluntary act, and in no way the act of the defendant. If the defendant is liable here at all, it must be solely because the deceased came and dies here after he was injured. Can that, in the nature of things, make the defendant guilty of murder or manslaughter here? If it can, then, for a year after an injury is inflicted, murder, as to its jurisdiction, is ambulatory at the option of the party injured, and becomes punishable, as such, wherever he may see fit to die. It may be manslaughter, in its various degrees, in one place; murder, in its various degrees, in another. Its punishment may be fine in one country, imprisonment, whipping, beheading, strangling, quartering, hanging, or torture in another, and all for no act done by the defendant in any of these jurisdictions, but only because the party injured found it convenient to travel."

In the case of State v. Bowen, 16 Kan. 475, Brewer, J., after reviewing the authorities bearing upon the question, says: "It seems to us, without pursuing the authorities further, reasonable to hold that, as the only act which the defandant does towards causing the death is in the giving the fatal blow, the place where he does that is the place where he commits the crime, and that the subsequent wanderings of the injured party, uninfluenced by the defendant, do not give an ambulatory character to the crime; at least, that those movements do not, unless under express warrant of the statute, change the place of offense; and that, while it may be true that the crime is not completed until death, yet that the death simply determines the character of the crime committed in giving the blow, and refers back to and qualifies that act."

In State v. Gessert, 21 Minn. 369, it appeared that the defendant was indicted for murder in Washington county, in that State, by feloniously stabbing and wounding one Savazyo, in said county, from which he died in the county of Pierce, in the State of Wisconsin. The indictment was demurred to, on the ground that it did not charge the commission of an offense in Washington county. The court sustained the indictment. Berry, J., in passing upon the question of jurisdiction, said: "It is for his acts that defendant is responsible. They constitute his offense. The place where they are committed must be the place where his offense is committed, and therefore the place where he should be indicted and tried. In this, the acts with which defendant is charged, to-wit, the stabbing and wounding, were committed in Washington county. The death which ensued in Pierce county, though it went to characterize the acts committed in Washington county, was not an act of defendant committed in Wisconsin, but the consequences of his acts committed in Washington county."

If the crime is deemed committed in the county where the fatal wounds were given, as the authorities hold, it follows that the offense was committed when such wounds were inflicted. True, the death occurred at a subsequent date, but it relates back to the time the mortal injury was received. The accused committed all the acts constituting the offense on July 4th; the death which ensued in Platte county, on July 9th, merely characterized his acts. The crime of murder consists in intentionally and unlawfully causing the death, and, while it is true that the crime is not complete until death occurs, yet it is incorrect to say that the death is an element in the crime. It is merely a necessary condition to it. The elements of the crime are the acts of the perpetrator, such as the malice, intent, and the wound or blow. The crime was committed when the mortal wounds were inflicted, and he is to be tried by the laws then in force.

A case precisely in point is People v. Gill, 6 Cal. 637. The defendant was indicted for the crime of murder. After the blow, but prior to the death of the victim, a change in the statute was made by the legislature. A conviction was had under the amended law, and upon a review of the case the Supreme Court held the crime to be of the date of the blow, and governed by the law then in force. The chief justice, in the course of his opinion, observed: "The blow was given before, but the death ensued after, the passage of the last statute. The death must be made to relate back to the unlawful act which occasioned it; and, as the party died in consequence of wounds received on a particular day, the day on which the act was committed, and not the one on which the result of the act was determined, is the day on which the murder is properly to be charged."

MANDAMUS — CORPORATION MEETING OF STOCKHOLDERS.—Gen. St. Conn. § 1945, provides that "a written or printed notice of each meeting of a corporation shall be given by the president or secretary," etc. It was held by the Supreme Court of Errors of Connecticut in Bassett v. Atwater, 32 Atl.

Rep. 937, that where the by-laws of a corporation provided that a special meeting of stockholders should be called in the manner provided by statute, on the request of the holders of a certain number of shares, *mandamus* will issue to compel the officers of the corporation to call such meeting on their refusal to do so when properly requested. One member of the court dissented. The following is from the opinion of the court:

Mandamus, although it is an extraordinary legal remedy, is in the nature of an equitable interference supplementing the deficiencies of the common law. It will ordinarily be issued where a legal duty is established, and no other sufficient means exist for enforcing it. When the object sought can be equally well obtained by other means, as by an action, or by some other form of proceeding, then *mandamus* will not lie. Thus the enforcement of merely private obligations, such as those arising from contracts, are not within its scope. The essential conditions without which the writ will not be issued to enforce the performance of a ministerial duty are: (1) That the party against whom the writ is sought must be under an obligation, imposed by law, to perform some such duty,—that is, a duty in respect to the performance of which he may not exercise any discretion; (2) that the party applying for the writ has a clear, legal right to have the duty performed; and (3) that there is no other sufficient remedy. In the present case the alternative writ, in point of form, contains allegations which show that all these conditions exist in favor of the plaintiffs; and as these are admitted by the motion to quash to be true, we are to inquire whether any of the allegations are insufficient in the law. The superior court found the insufficiency in the fact that the duty sought to be enforced was one imposed by the by-laws of the corporation. In its memorandum of decision that court said: "The by-laws in question do not have the force or dignity of public law. Their office is a private one, and the duties they impose are private, not public, in their nature. The individuals concerned, and not the public at large, are interested in their obedience. Disobedience of them works a private injury, not a public wrong. Breach of the duties they impose is a breach of private duty, and not of a public trust. * * * The writ of *mandamus*, therefore, is not a remedy appropriate to the circumstances the complaint discloses." This memorandum seems to indicate that the superior court was of opinion that a writ of *mandamus* was a remedy to be used only in cases where the duty sought to be enforced was one imposed by public law, and one the non-performance of which worked a public wrong; and that the alternative writ in this case was defective in both these particulars. But is this true? To speak first of the defect last mentioned, is it true that a *mandamus* is to issue only to enforce a duty in the performance of which the public at large has such an interest that its non-performance is in the nature of a public wrong? Perhaps the earlier cases—some of them—mentioned this as a necessary requirement. But even then it was not strictly insisted upon. The writ was often issued in cases where the question in controversy was rather upon some matter of private right than upon a public one. The courts then followed the rule given by Lord Mansfield in Rex v. Barker, 3 Burrows, 1267, that: "The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied." Rex v. Turkey Co., 2 Burrows, 943; Rex v. Wildman, 2 Strange, 879; White's Case, 2 Ld. Raym. 1004; Case of Schriven, 2 Strange, 832; Dacosta v. Russia Co., *Id.* 783; Anon., *Id.* 696. In this jurisdiction this feature is substantially disregarded, and *mandamus* is issued in cases where the duty is one imposed by public authority, and its non performance operates only as a private wrong. Thus, a justice of the peace may be required to correct his record at the application of one who has only a private interest in it. Smith v. Moore, 38 Conn. 105. A judge of probate may be required to amend his record so as to enable a party to take an appeal, though no person in the world is interested in the suit but the appellant. Taylor v. Gillette, 52 Conn. 216; Elderkin's Appeal, 49 Conn. 69. See, also, Daly v. Dimock, 55 Conn. 579, 12 Atl. Rep. 405; Gilman v. Bassett, 33 Conn. 298; Insurance Co. v. Fyler, 60 Conn. 448, 22 Atl. Rep. 494; Brainard v. Staub, 61 Conn. 570, 24 Atl. Rep. 1040. We understand this to be the general doctrine in America and England at the present day. Mr. High, in the very first section of his valuable work on Mandamus, says: "The object of a *mandamus* is to prevent disorder from a failure of justice and a defect of police, and it should be granted in all cases where the law has established no specific remedy, and where in justice there should be one. And the value of the matter in issue, or the degree of its importance to the public, should not be too scrupulously weighed." And in the tenth section: "The test to be applied, therefore, in determining upon the right to relief by *mandamus*, is to inquire whether the party aggrieved has a clear legal right, and whether he has any other adequate remedy, since the writ only belongs to those who have legal rights to enforce, who find themselves without an appropriate remedy. And whenever the conditions above noticed coexist, the right to the extraordinary aid of a *mandamus* may be regarded as to that extent *ex debito justitiæ*." We think the alternative writ was not insufficient for such reason. It is not to be tolerated that where the law in precise terms directs the performance of an act it is incapable or unwilling to enforce obedience to mandate its because only one person, or a few persons, are interested in securing such obedience. Rex v. Justice of Kent, 14 East, 395; Rex v. Archbishop of Canterbury, 15 East, 117; Rex v. Bishop of Chester, 1 Term. R. 396; Rex v. Severn & W. Ry. Co., 2 Barn. & Ald. 646; People v. Supervisors of Albany, 12 Johns. 415; Bright v. Supervisors, 18 Johns. 242; High, Extr. Rem. § 350; 14 Am. & Eng. Enc. Law, 102.

The other defect indicated by the superior court, and the one doubtless which had the greatest weight, seems to have been that the duty imposed on the defendants by the corporate by-laws to call special meetings was a duty imposed by a mere contract obligation, and not by law. The memorandum of decision from which we have quoted uses the expression "public law." We do not understand the court by that expression to intend anything more than to distinguish between the law—*i. e.*, the law of the land—and a mere contract obligation. If these by-laws impose no duty on the defendants other than one growing out of a contract, then it is certain that a writ of *mandamus* is not the proper remedy for a neglect or refusal to obey them; and for the reason, if for no other, that for the non-performance of such a duty there is always another adequate legal remedy. State

v. Zanesville Turnpike Co., 16 Ohio St. 308. We are brought, then, to the inquiry: Do these by-laws impose no obligation except such as rests wholly upon contract, and which involves no question of trust or official duty? Two or three observations may tend to elucidate this inquiry. In the first place, all corporations are the creatures of public law. Then, the duty which these by-laws command is a ministerial one. It is a precise act, accurately marked out, enjoined upon particular officers for a particular purpose. Insurance Co. v. Fyler, 60 Conn. 448, 22 Atl. Rep. 494; Brainard v. Staub, 61 Conn. 570, 24 Atl. Rep. 1040. And there is no adequate remedy to enforce this duty other than this writ: at least no other one has been suggested. An action on the case for damages, if that would lie, which is by no means certain, would not be an adequate remedy, for that would bring only pecuniary compensation, and the plaintiffs are entitled to have the very duty performed. Fremont v. Crippen, 10 Cal. 211; *In re* Trustees of Williamsburgh, 1 Barb. 34; Etheridge v. Hall, 7 Port. (Ala.) 47; People v. Mayor, etc., 10 Wend. 395; Hull v. Supervisors, 19 Johns. 259; McCullough v. Mayor, etc., 23 Wend. 458; People v. Taylor, 1 Abb. Prac. (N. S.) 209; Spell. Extr. Rel. § 1375. The equitable proceeding for specific performance obviously could not be brought, for that lies only where there is a contract obligation. It may be that an action in the nature of a bill in equity could be also maintained by one of the stockholders in behalf of the corporation, to compel the president and secretary to perform the duties of their trust. Mor. Priv. Corp. § 273. But the existence of an equitable remedy is never a bar to the issuing of a *mandamus*. Cook, Stocks & S. § 593. The by-laws of a corporation doubtless express—as does its charter—contract relations, but it is a contract between the corporation and each of the stockholders, and not one of the stockholders with one another. The officers and directors of a corporation hold a position of trust. Especially is this so as to officers who are chosen by the command of the statute. Section 1950 of the General Statutes requires all joint-stock corporations to elect one of its directors to be the president, and also to elect a secretary; and, although these officers are chosen by the corporation, their duties may be, and often are, prescribed by the general laws of the State. Duties so prescribed, when of a ministerial character, may always be enforced by *mandamus*. Gen. St. § 1945, after providing for the calling of the first meeting of a joint stock corporation by any two of the corporators, proceeds to declare that "a written or printed notice of each subsequent meeting of such corporation, specifying the place, day, and hour of such meeting, shall be given by the president or secretary to each stockholder, by leaving it with him, or at his residence or usual place of business, or by depositing it in some post-office for transmission by mail, postage paid, addressed to him at his last known place of residence, at least five days before said meeting." The by-laws of the Derbey Rubber Company provide that the president or secretary shall give such notice of a special meeting at any time upon the written request of the holders of 200 shares of the stock of the company. The statute, by establishing the only mode in which special meetings may be called, makes it the imperative duty of the president or secretary to give the prescribed notice whenever it is properly required. It is left to each corporation to determine for itself under what circumstances a special meeting is to be held. The by-law which is relied on in this case gives the right to demand one to the holders of 200 shares of stock. Upon such a demand the duty imposed by the statute upon the president or secretary becomes an active one. It is a duty created by the laws of the State, and therefore properly enforceable by the courts of the State, although only called into exercise through the by-laws of the corporation. Mor. Priv. Corp. §§ 273, 491; Cook, Stocks & S. § 593; People v. Board of Governors, 61 Barb. 397; Cummings v. Webster, 43 Me. 192, 197; Potter, Corp. §§ 72, 75; McDermott v. Board, 25 Barb. 635; People v. Cummings, 72 N. Y. 433; Mottu v. Primrose, 23 Md. 482; 14 Am. & Eng. Enc. Law, 155; Reg. v. Aldham & United Parishes Ins. Soc., 15 Jur. 1035, 6 Eng. Law & Eq. 365.

PRINCIPAL AND AGENT — AUTHORITY OF AGENT—RECEIVING NOTE AS PAYMENT.—In McGrath v. Vanaman, 32 Atl. Rep. 686, it was held by the Court of Chancery of New Jersey that an agent who is authorized to sell standing timber has no implied authority to accept a note of the purchaser as part payment, made payable in three months, to the order of the agent individually, and in no manner disclosing his agency; and in such case the principal will be sustained in asking for a rescission of the contract. The following is from the opinion of the court:

First, as to the sale upon credit. The general rule is that an agent who is authorized to sell, without more, can only sell for cash. Smith Merc. Law, p. 163; Mechem, Ag., Sec. 353; Woodward v. Jewell, 140 U. S. 247, 11 Sup. Ct. Rep. 784; Burks v. Hubbard, 69 Ala. 379; Payne v. Potter, 9 Iowa, 549; Wilshire v. Sims, 1 Camp. 258; Lumpkin v. Wilson, 5 Heisk. 555; School Dist. No. 6 v. Ætna Ins. Co., 62 Me. 330; Cummings v. Beaumont, 68 Ala. 204; Baldwin v. Merrill, 8 Humph. 132-139. The language of this agreement is such, when considered independently of the note which was taken, and which bears evidence of the credit, as to present a reasonable doubt as to the validity of this objection to the sale. It will be seen, by reading so much of the tenth clause of the agreement as is above quoted, respecting the sale of real estate, that it was expressly provided thereby that "all such sales should be for cash," whereas the following clause, as will be seen, which authorized the sale of standing timber, makes no mention whatever either of cash or credit. The fact that cash is expressly required in the former paragraph, and that no mention whatever is made of it in the latter, brings to the mind and gives emphasis to the familiar maxim "*Expressio unius est exclusio alterius*." Broom, Leg. Max., top pages 414, 418, *505, *510. In Hare v. Horton, 5 Barn. & Adol., 715, 721, the court said: "And the grant is 'of the said iron foundry, together with the said dwelling houses, warehouses,' etc., after which nothing is said of the fixtures belonging to the foundry, but the deed goes on: 'Together with all grates, boilers, belts and other fixtures in and about the said two dwelling houses, and the brewhouses thereto belonging'—for there are threehouses mentioned, and a grant of fixtures refers only to those in two, can it be said that those in the third will pass? the maxim '*Expressio unius est exclusio alterius*' would apply." In this case the effort was made to include in the conveyance those articles which are commonly regarded as fixt-

ures which were not named in the agreement, but which would have passed as fixtures had certain other articles which the law also regards as fixtures not been named. The court held that the articles not named were excluded from the conveyance because of the rule referred to. This very decisive case is not in harmony with the doctrine given by Parsons (2 Pars. Cont., 28), where he lays down the rule saying: "If the parties expressly provided, not anything different, but the very same thing which the law would have implied, now this provision may be regarded as made twice; by the parties and by the law. And, as one of these is surplusage, that made by the parties is deemed to be so; and hence is derived another rule of construction, namely, that the expression of those things which the law implies works nothing." Notwithstanding this, the learned author, in a note to the phrase just quoted, says: "This is in accordance with the maxim '*expressio unius est exclusio alterius.*'" The influence which is so generally if not universally given to the last named maxim prompts me to hesitate in joining with the complainant in her efforts to rescind this contract simply upon the ground of want of authority in her agent to sell upon credit.

But there is another phase of the question, arising out of the credit given, which I find sufficient to justify the prayer of the complainant. The credit given was manifested by a note for $200, given to the order of Hume, without in any manner indicating his agency. The time of credit was three months. The taking of this note in the name of another person than the principal is fatal to the transaction. To show this it need only be stated that with the knowledge of Vanaman, the purchaser, it was thus placed within the power of Hume, the agent, to sell, assign and transfer this note to whomsoever he would, and thus put it out of the power of the complainant to recover of anyone but the agent, or, in case of the agent's death, still holding the possession of the note, not only to postpone the collection of the amount due indefinitely, but to the great risk of establishing its identity. This would certainly be so, since Vanaman, the maker, would be justified in demanding the surrender of the note upon payment. All will agree that this was an out and out conversion of the property of the complainant to the use of Hume, the agent, with the knowledge and by the active aid of Vanaman, the purchaser; for there is no pretense that Vanaman was ignorant of the agency of Hume. Therefore I will advise that the contract be rescinded. Since the complainant has received part of the purchase money, and the defendant, Vanaman, has cut and carried away parcel of the timber, there must be an accounting, and the balance paid to the one in whose favor it appeared to be.

INDIVIDUALITY IN TRADE DEVICES.

By long use of some peculiar arrangement of words, lines, or figures, in the form of a label as a distinguishing mark upon manufactured products, a right therein in the nature of property is acquired by him who has originated such design, to use it to the exclusion of all others.[1] A Master of the Rolls says: "There must be such a general resemblance of the forms, words, symbols and accompaniments as to mislead the public," and "a sufficient distinctive individuality must be preserved so as to procure for the person himself the benefit of that deception which the general resemblance is calculated to produce,"[2] to accomplish a fraud in the sale of goods bearing a device adopted and used by one who seeks to restrain the person charged with the deception in the use of it. The peculiarity of the device or label is necessary. It should be something akin to an invention, which is not found in a mere general description by words in common use to describe a kind of article or its nature or qualities, for such words so arranged as to be descriptive of a thing are not susceptible to the rights under discussion.[3] But one may make use of his own name for the purpose of identifying or designating his manufactured products, although the same name may be in use by another whose adoption of it is first and to whom it is of special value.[4] But while it is just to one to secure to him the advantages and benefits that may come to him in the use of his name to give character to his goods, yet the law exacts from him fair, open and honest conduct towards his competitor. It encourages competition in trade and guards its rights. However, a person of a different name would be restrained by the court from the use of the name so employed, on the ground of an invasion of the rights of him who lawfully uses it.[5] But while the mere use of a name common to two persons is a recognized right, the use of it in connection with other symbols or words already adopted by one, and by which his goods are known, is exclusive as against the other, because the effect of its use is to lead the public to believe the goods of the latter are those of the former.[6] It is doubtful if

[1] Gilman v. Hunnewell, 122 Mass. 139; Massam v. Thorley Cattle Food Co., L. R. 14 Ch. Div. 748; Coates v. Merrick Thread Co., 149 U. S. 562.

[2] Croft v. Day, 7 Beav. 84; also, see, Wetherspoon v. Currie, 5 H. L. 508; Thompson v. Montgomery, 41 Ch. Div. 35.

[3] Singleton v. Bolton, 3 Doug. 293; Thompson v. Winchester, 19 Pick. 214; Canal Co. v. Clark, 13 Wall. at 323; Raggett v. Findlater, L. R. 7 Eq. 29; Carswell v. Davis, 58 N. Y. at 233.

[4] Russia Cement Co. v. La Page, 147 Mass. 206; Croft v. Day, 7 Beav. 843; Burgess v. Burgess, De G. M. & G. 896; Rogers v. Taintor, 97 Mass. 296.

[5] Millington v. Fox, 3 Myl. v. Craig, 338; Dent v. Turpin, 2 Johns. & Hem., 139; Meneely v. Meneely, 62 N. Y. 427.

[6] Meriden Britannia Co. v. Parker, 39 Conn. 450; Holloway v. Holloway, 13 Beav. 209; Sykes v. Sykes,

any man would seize the trade device of another and use it to distinguish his own goods in the market, for the act itself would disclose the purpose intended by the user. But he might try to disguise a wrong intent by making an immaterial change or variation in the device sufficient to show some individuality; and yet he would mislead the public thereby. And this seems to be the gist of the whole matter. The Supreme Court of the United States says, that "rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their enclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals."[7] If the imitation is satisfactorily made to appear to the court, the intent to injure the complainant may be inferred therefrom.[8] But a court of equity will not lend active aid to sustain a claim to a trademark which contains a misrepresentation to the public.[9] This is clearly shown in Wetherspoon v. Currie. In that case the plaintiffs were manufacturers of starch at Glenfield which had become known on the market and sold as "Glenfield Starch." The defendants actually made starch at that place, but it appears that they located there so they might in truth make use of the name of the town, and they made use of a label on which was printed "Currie & Co., Starch & Corn Flour Manufacturers, Glenfield." Here was no lie in regard to the entire name, but by reason of the action of defendants, plaintiff sustained injury. Their acts carried the inference to the public that goods made by them were those of the plaintiff. So it appears that from long use a word acquires a secondary signification when used in connection with the manufacture and sale of particular products;[10] noticeably so in the case of Thompson v. Montgomery.[11] Plaintiff manufactured ale at a town called Stone and for many years his brewery was known as "Stone Brewery," the product of which was known as "Stone Ale" on the market. Defendant, who had been selling "Stone Ale" erected a brewery at Stone and adopted a device as a trademark so similar to that of plaintiff that it was merely colorable; but it possessed an individuality in the letters "T. M." and in a variation in the design. It was insisted in argument that plaintiff had not an exclusive right to use the word "Stone." The court thought this might be true as against the world, but could see nothing in the acts of the defendant but a fraudulent intent. He had invaded the rights of the plaintiff. At first he designated his place as the "Stone Brewery;" upon remonstrance made by plaintiff he changed the name to Montgomery's Stone Brewery. His purpose was betrayed by the perfunctory manner in which he yielded to his opponent and by covertly attempting to retain the essential element of the trade-mark.

On the other hand, in Gilman v. Hunnewell, *supra*, plaintiffs were assignees of John Hunnewell and alleged that Edwin Hunnewell one of the defendants had formerly been in the employ of John and had there learned how to put up medicines and use the trademarks in use by him, charging fraud and misrepresentation in the employment of labels of plaintiffs. But defendants did not use the distinctive term upon such labels, used different type in printing same, varied the design in form, had different colored paper from that of plaintiffs, and had issued a circular to the public stating their purpose to manufacture medicines under certain names and at a stated place. The trial court found an entire absence of fraud and the bill to enjoin defendants was ultimately dismissed on the ground that there was no infringement of the plaintiffs' rights. Defendant Hunnewell had a right to use his own name; he gave an individuality to the names of his remedies and was fair and open in his conduct to the public. The claim against him rested upon the use of printed matter which was purely descriptive of the remedies. The reason of the rule applied in all cases arising *ex delicto* is

3 B. & C., 541; Clark v. Clark, 25 Barb. 79; Faber v. Faber, 49 Barb. 357; Pillsbury v. Pillsbury, W. F. M. Co. Ltd., 66 Fed. Rep. 866.

[7] Coates v. The Merrick Thread Co., 149 U. S. 562; Massam v. Thorley Cattle Food Co., *supra;* Perry v. Truefitt, 6 Beav. 66; Boardman v. Meriden Britannia Co., 35 Conn. 402.

[8] McLean v. Fleming, 96 U. S. 245; Pillsbury v. Pillsbury, W. F. M. Co. Ltd., *supra;* Shaver v. Shaver, 54 Iowa, 208 and cases cited on p. 211.

[9] Connell v. Reed, 128 Mass. 477; Manhattan Medicine Co. v. Wood, 108 U. S. 218; Perry v. Truefitt, 6 Beavan, 66.

[10] *c. f.* Burgess v. Burgess, 3 D. M. & G. 896.

[11] Thompson v. Montgomery, 41 Ch. Div. 35.

two-fold; a fraud upon the owner and a fraud upon the public. The latter buys goods bearing a certain mark; it means a particular quality or manufacture to the buyer; if he does not in fact get the article known to him by its distinguishing mark, he is cheated; and thereby a sale is lost to the producer of the goods wanted. They are of known value to the public, and the elements which enter into and create the demand for them are the product of the brain and character of the man who makes the article desired. And the deception which deprives a man of these is a means of robbery. People speaking a foreign language become acquainted with an article of manufacture, exported to them, by means of the design, or some part of it, on the label affixed to it, and a long trade in the goods may give the particular thing or the label a local significance and the presence of it carry assurance to the buyer of the article desired.[12] In Johnston v. Ewing, a certain quality of red yarn had become known to the people in ports of the Red Sea by a trade-mark which they called the "Two Elephants." The defendants introduced red yarn among the same people bearing a device very dissimilar to that of plaintiff when the two labels were placed in comparison, but which bore two elephants, having relatively different positions on the badge than those of plaintiff. But it was held an infringement of the latter's right, the intent appearing in the knowledge defendants had of the trade value of the goods and in their retention of the essential element of plaintiff's trade-mark. As may be inferred from the principle involved, the public may give a name to business which really becomes a mark of good repute for which the proprietor may claim protection of a court of equity,[13] although there may be nothing in the name which he has given to his business entitling him to any. In Lee v. Haley the name of the plaintiff company was not proprietary, but its place of business was on "Pall Mall" and the public had distinguished it from others of the same name by the use of those words. Defendant, a former manager of the company after doing business under the same name on a different street moved into Pall Mall and prefixed those words to the name in use and did business near plaintiff, sending out circulars to customers of the old firm. He was enjoined.

So, too, a system of numbers adopted and used by a manufacturer in order to designate goods of his make, may be subject to the same protection in equity as an ordinary trade-mark.[14] But they must be capable either in themselves or in connection with other parts of the device of conveying some meaning to purchasers.[15] Or else they must have relation to the origin or ownership of the goods.[16] If the public identifies the goods bearing the particular mark, with some manufacturer of them, that is enough to establish his claim if he be the originator of the mark; and equity will restrain the use by another of the particular or essential symbol of such device even though the public knows the goods of the latter are not those of the true owner of the mark.[17] Proof of deception in obtaining such relief is unnecessary if the court sees the probability of the deceit of the seller.[18] If one man uses the device adopted by another, in utter ignorance of its existence apart from the use he makes of it, the want of scienter must appear in an action against him to recover damages, and so negative the charge of fraud made by the complainant, and yet there is an infringement.

Trade names are assignable and pass to the assignee under proper terms.[19] In Kidd v. Johnson the seller by a separate writing says that he extends to his purchaser the use of all his brands, formerly used by him. It passed the use of the name. In Hoxie v. Chaney, the words—meaning hereby to sell and convey to P all my interest in the entire assets of the firm wherever they may be found, passed the right to use the name Hoxie in the manufacture and sale of a certain kind of soap. Hoxie claimed that his

[12] Johnston v. Ewing, 7 App. Cas. 219.

[13] Lee v. Haley, L. R. 5 Chan. App. 155; Edelsten v. Edelsten, 1 D. J. & S. 185.

[14] Ainsworth v. Walmsley, L. R. 1 Eq. 518.

[15] Manufacturing Co. v. Trainer, 101 U. S. 51.

[16] Amoskeag Mfg. Co. v. Spear, 2 Sandf. 599.

[17] Edelsten v. Edelsten, *supra*—Lord Chancellor; McAndrew v. Bassett, 4 D. J. & S. 380; Singer Mfg. Co. v. Wilson, 2 Ch. Div. 434.

[18] Filley v. Fassett, 44 Mo. at 178; Coats v. Holbrook, 2 Sandf. at 626.

[19] Kidd v. Johnson, 100 U. S. 617; Warren v. Warren Thread Co., 134 Mass. 247; Leather Cloth Co. v. American Cloth Co., 11 H. L. Cas. 523; Hoxie v. Chaney, 143 Mass. 592; Sohier v. Johnson, 111 Mass. 243; Russia Cement Co. v. LePage, *supra*; Oakes v. Tonsmiere, 4 Woods, 547; Fraser v. Fraser, 18 Bradw. 450; Probasco v. Bouyon, 1 Mo. App. 241.

name being something personal could not be assigned. The court in denying this recognized the fact that the name by an artist, or artisan, where personal skill were required, could not be assigned. In closing, it may be stated, although, perhaps, out of order, that acquiescence of long standing in the use of a device and delay in asserting rights, under it are a bar to recovery of gains and profits, although an injunction for infringement would be granted in such a case.[20]

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[20] McLean v. Fleming, 96 U. S. 245. See further upon the subject in general, Ford v. Foster, L. R. 7 Ch. 611; Taylor v. Carpenter, 3 Story, 453; Davis v. Kendall, 2 R. I. 566; Congress Spring Co. v. High Rock Spring Co., 45 N. Y. 291; Burnett v. Phalen, 3 Keyes, 594; Newman v. Alvord, 51 N. Y. 189.

EXPECTANCIES—CONVEYANCES.

McCALL'S ADMINISTRATOR V. HAMPTON.

Court of Appeals of Kentucky, October 17th, 1895.

A son's interest in his father's estate, which he expects to inherit, is a mere possibility and he cannot convey it.

PAYNTER, J.: The appellant—holding, by an assignment, a certain note against Wade Hampton—instituted this action, in which an attachment was obtained and levied on what was claimed to be his interest, as an heir at law, in certain lands in Boyd county, which belonged to his father, William Hampton, who died intestate on the 26th day of August, 1889. Charles H. Hampton, a brother of Wade Hampton, died on the 7th day of February, 1889. His personal representative presented his petition in the action, and was made a defendant therein. The allegations which it contains are substantially as follows, to-wit: That Wade Hampton was suffering from a cancer, and was without means to procure medical treatment for his malady; that his father had expressed a desire to sell part of his land, to aid him; that the father was then too infirm to make such disposition of his property; that in order that he might procure medical treatment, in consideration of $800, Wade Hampton sold, and by deed conveyed, to Charles H. Hampton, all right, title, and interest he then had, or might thereafter become entitled to, in the estate of his father, William Hampton, of whatsoever character; that by the deed he attempted to convey to him his whole interest as fully as if he was then seised and possessed of the same, the deed containing a covenant of general warranty. This deed was executed on the 27th of January, 1886,—more than three years before the death of the father. To this pleading a demurrer was filed and overruled; and, appellant failing to plead further, the petition was dismissed, and the attachment discharged. The question raised by the demurrer, and which is to be determined, is, did Charles H. Hampton acquire the interest of Wade Hampton in his father's estate by virtue of the conveyance which he received for it?

That a contingent interest is the subject of transfer and sale, there can be no doubt. A contingent estate which is to vest upon some future event, such as the owner's becoming of age, may become the subject of assignment or contract of sale. Grayson v. Tyler's Adm'x, 80 Ky. 363. The question in this case is whether a naked possibility or contingency, not founded upon a right or coupled with an interest, can be assigned or sold. Under the common law, this could not be done. There is no statute in this State changing the common law on this subject. When the contract was made, and the conveyance made to C. H. Hampton, Wade Hampton did not have any interest in his father's estate. The subject-matter of the contract was not *in esse* at the time of the contract. A contract of bargain and sale is invalid unless there is a thing or subject-matter to be contracted for. This is absolutely essential to the validity of the contract. It has been said that, "if a son and heir bargain and sell the inheritance of his father, this is void, because he hath no right in himself." Co. Litt. 265; 2 Bac. Abr. tit. "Bargain and Sale," p. 4. This question was fully considered in the case of Wheeler's Ex'rs v. Wheeler, 2 Metc. (Ky.) 474. The court held that the son, who had executed a deed purporting to convey his interest in his father's estate (the father then being alive) to his brother, was, notwithstanding that fact, entitled to recover the interest in the estate which his deed purported to convey. It is conceded by counsel for appellee that it is essential to the legal validity of a contract that the thing sold must have an actual or potential existence, and that a mere possibility or contingency, not founded on a right or coupled with an interest, cannot be the subject of sale or assignment. Notwithstanding this is the common-law rule, it is insisted that the naked possibility or expectancy of an heir to his ancestor's estate may be the subject of a contract of sale, for a valuable consideration, and enforced in equity after the death of the ancestor. There was no claim in Wheeler's Ex'rs v. Wheeler that the sale was not in good faith, nor for a valuable consideration, still the court held the son was entitled to recover. In the case of Alves v. Schlesinger, 81 Ky. 290, the facts were substantially as they are in the case at bar. The conveyance was for a valuable consideration. After the death of the ancestor, a creditor of the heir who undertook to sell his interest in his ancestor's estate during the ancestor's life-time sought to subject such interest to the payment of his debt. The party to whom the contract of sale had been given claimed the interest under the contract, and denied the creditor's right to subject it to the payment of the debt. This court sustained the claim of the creditor.

To recognize the contention of counsel as being correct requires us to overrule Wheeler's Ex'rs v. Wheeler and Alves v. Schlesinger. Let us consider if this should be done. Every text writer and every court in this country, so far as we are aware, recognize the rule of the common law to be as we have stated it. Some text writers say, and some courts have held, that a mere possibility or expectancy is assignable in equity, for a valuable consideration, and equity will enforce the contract when the possibility or expectancy has changed into a vested interest or possession. The explanation is, sometimes, that the assignment operates as a contract by the assignor to convey the legal estate or interest when it vests in him, and that equity will specifically enforce such contract, by decreeing a conveyance. Lumber & Manuf'g Co. v. Marsh, 91 Pa. St. 96, is cited by counsel for appellee, and the court assigned this as the reason for its decision, viz.: "Equity will support assignments of contingent interests and expectancies,—things which have no present, actual existence, but rest in mere possibility; not, indeed, as a present, positive transfer, operating *in præsenti* for that can only be a thing *in esse*, but as a present contract, to take effect and attach as soon as the thing comes *in esse*." This case is cited to sustain the text (Pom. Eq. Jur.) wherein it is stated that equity will enforce contracts of sale of bare possibilities and expectancies. In the note to the text it is said: "In my opinion, this theory of agreement is hardly adequate to explain the full doctrine." The learned author (Pom. Eq. Jur. close of note 1, § 1287), feeling that the courts which held that such contracts could be enforced in equity after the death of the ancestor were failing to give an adequate reason for their decisions, on the "theory of agreement," and that it would not do to admit that the right to the expectancy did not attach until the death of the ancestor, presented as the *rationale* of the equitable doctrine (section 1271) that the assignee of the expectancy acquired at once a present, equitable right over the future proceeds of the expectancy, which was of such certain and fixed nature that it was sure to ripen into an ordinary equitable property right over those proceeds as soon as they came into existence by a transformation of the expectancy into an interest in possession; that there was an equitable ownership or property, in abeyance, to be changed to an absolute property upon the happening of the future event. The learned author was conscious of the fact that, when a court said that the assignee or vendee did not take a present interest in the thing contracted for, it was illogical that such interest would attach as soon as the thing came *in esse*. His conclusions were correct. But, when he endeavors to give the correct theory upon which courts of equity proceeded, he gives one more indefensible than the one which he criticises. He states a matter which does not exist in fact or law,—that a bare possibility or expectancy is "sure to ripen into an ordinary equitable property right." On the contrary, it is absolutely uncertain that it will ripen into a property right at all. Notwithstanding the thing is not *in esse*, the learned author says that there is acquired at once a present equitable right over the future proceeds of the expectancy. Here we have the assignee or vendee taking a present right in a thing not in existence, and in the proceeds of an expectancy which may never materialize. To reach his conclusion, he utterly disregards the legal significance of the words "naked possibility or expectancy." They import a hope of succession, but not a certainty, as implied by the statement that they were sure to ripen into a property right. His premises are false, and conclusions erroneous. It is axiomatic that in every valid grant there must be a grantor, grantee, and a thing to be granted. When there is no subject-matter, nothing *in esse*, about which a contract can be made, the essential thing to the validity of a contract is absent; hence such contract is declared by the law to be void. If it be void, then no party to it can maintain an action upon it. A wise public policy produced the law which fixed the *status* of parties to such a contract. If it is wholesome to declare such contracts invalid, why should courts of equity enforce such contracts, in defiance of the law and a wise public policy? If this is to be the practice of courts of equity, then the common law on this subject is a dead letter, and inoperative. Why should the common law declare a contract invalid and void, if courts of equity have the power to verify and enforce them? If this is to be the rule, why not declare the common law not in force on this subject? It seems to us to be a travesty upon common sense for the law to declare a contract void, and yet say that it is enforceable in a court of equity. Some courts hold that the expectancy of an heir to inherit his father's estate is not an interest capable of assignment in equity, any more than at law, and we agree with such courts upon the question. It seems, at this late day, it is needless to discuss the wisdom and policy of a law which has been sanctioned for so many generations, and we do not feel that we are called upon to defend it. A strict adherence to it will save multiplying contentions, protect the improvident children and heirs at law from fraud and deceit,—save free and untrammeled the actions of the possessors of estates in their distribution. If there were no other reason for adhering to the rule, to avoid the consequences to flow from its abrogation, those just suggested would be all sufficient, in our opinion, for doing so. Judgment reversed, with directions to set aside the order overruling the demurrer, and for further proceedings consistent with this opinion.

NOTE.—The principal case takes a position which is in opposition to that of most of the authorities. Varich v. Edwards, 1 Hoff. Ch. Cas. 382. In a great variety of cases such conveyances have been upheld. An agreement between two brothers to divide equally between the two all property received from their

father in his life-time, by will, descent, or otherwise, was held to be binding. Wethered v. Wethered, 2 Sim. 189. An agreement was considered to be valid, wherein A contracted to convey to his brother, as soon as he should receive it, the half of a tract of land, which he expected his father to devise to him. Lewis v. Madisons, 1 Munf. (Va.) 303. A provision in marriage articles to convey to the husband one-third of the property which should be inherited by the wife on the death of her father was enforced. Hobson v. Trevor, 2 P. Wins. 192. A signed a deed agreeing that if B, whom he was about to marry, should die without issue, or in case issue survived her, if such issue should die under 25 years of age, then B's real estate should go to C. Both contingencies having happened, the estate was decreed to C. Parsons v. Ely, 45 Ill. 232. Before such contracts will be enforced, it must be shown that they are *bona fide* and that the fair market value has been paid for the property. Bacon v. Bonham, 33 N. J. Eq. 614. Such transactions are looked upon with jealousy, and are closely scrutinized. Fitzgerald v. Vestal, 4 Sneed (Tenn.), 258. The party, claiming the benefits of such a contract, must show the absence of fraud and the consideration therefor. Bacon v. Bonham, 33 N. J. Eq. 614; McClure v. Roben, 125 Ind. 139. The courts are very favorably disposed toward such contracts, if they were known to, and approved by, the party from whom the estate is to be derived. Fitzgerald v. Vestal, 4 Sneed (Tenn.), 258; Fitch v. Fitch, 8 Pick. 480. It has even been held, that such knowledge is essential in cases where the contract contains no covenant of warranty. McClure v. Roben, 125 Ind. 139. It has been held, that a deed conveying the expectancy of a prospective heir, unless it contains covenants of warranty, has only the effect of a quit-claim and will not be enforced, Hart v. Gregg, 32 Ohio St. 502. Other courts do not require such covenants, when an heir's expectancy is released. Bishop v. Davenport, 58 Ill. 105. The conveyance, if sustained by sufficient consideration, is considered in equity as an executory agreement to convey, a covenant for a future conveyance. Bayler v. Com., 40 Pa. St. 37. If the consideration for the conveyance is not deemed sufficient, or is uncertain in amount, owing to certain contingencies, the court will not enforce it. Where A for a certain sum of money agreed to convey to B one-third of all the land which he should receive by descent, or by will, from C or D, the court considered the compensation to accrue to B to be too uncertain and refused to enforce the contract. Boynton v. Hubbard, 7 Mass. 112. The rule requiring the purchasers of expectancies to prove a sufficient consideration passing from them has in England been extended in favor of reversioners and remainder-men (Aylesford v. Morris, 8 Ch. App. 497; Beynon v. Cook, 10 Ch. App. 389), but such extension has been considered not to be appropriate to American institutions, wherein promogeniture and entail meet with little favor. Cribbins v. Markwood, 13 Grat. (Va.) 495. All authorities agree with the principal case in the proposition that such contracts are not enforceable at law. Bayler v. Com., 40 Pa. St. 37. The chancellors have given different reasons for the interference by equity in such cases. It is said that the assignment of things resting in mere possibility operates by way of present contract to take effect and attach as they come in equity, and may be enforced as a contract *in rem* in *esse*. Mitchell v. Winslow, 2 Story, 630. Equity interferes because a party contracting for a valuable consideration is understood to engage to make the instrument as effectual as he has power to make it. Varick v. Edwards, 1 Hoff. Ch. Cas. 382. Another reason given for the interference of equity is *ut res magis valeat quam pereat*. Mastin v. Marlow, 65 N. C. 695. The course of equity in such cases has been summarized as follows: If the consideration be fair and adequate, and no advantage has been taken, the contract will be enforced; when advantage has been taken of the necessities of the party, the contract will be held as security for the money actually advanced with interest; in all other cases relief will be refused because of fraud and imposition. Mastin v. Marlow, *supra*. Of course it seems incongruous to assert that one court will enforce a contract and another will hold it as invalid, and courts of equity have indulged in similar reflections concerning courts of law as are found in the principal case relative to courts of equity. Boynton v. Hubbard, 7 Mass. 112. Such differences have always been attributed to the different modes of procedure and different modes of investigation, but as long as litigants may resort to either tribunal they are of no practical consequence. In States which have adopted the code practice, which is an adaptation of legal actions to equity practice, there can be no occasion for such disquisitions.

S. S. MERRILL.

JETSAM AND FLOTSAM.

CONTRACTS BETWEEN HUSBAND AND WIFE FOR PERSONAL SERVICES.

In Michigan Trust Co. v. Chapin, recently decided by the Supreme Court of Michigan (64 N. W. Rep. 334), it was held that an agreement whereby a husband promised to pay his wife a specified sum per year for keeping house is contrary to public policy and void. The suit was in behalf of a creditor of the husband to set aside a conveyance to the wife, the alleged consideration for which was household services claimed to have been rendered under a contract for pecuniary compensation. The point is not elaborately reasoned, the ground, however, being briefly stated that "the promises to pay for services which the very existence of the relation made it her duty to perform, was without consideration." In Schouler's Domestic Relations (4th edition, section 43) the law is formulated as follows:

"The wife's obligation to render family services is at least co-extensive with that of the husband to support her in the family, these services and the comfort of her society being in fact the legal equivalent of such support. Hence, as it is held, the wife of an insane man cannot claim special compensation out of his estate for taking care of him, even though such were the express contract between herself and the guardian. Doubtless it would be bad policy to permit marital services on either side, however meritorious, to become a matter for money recompense, and to strike a just balance is impossible."

The case relied on by the learned author as to authority for withholding compensation to the wife of an insane man for taking care of him, although an express contract with his guardian was shown, was Grant v. Green (41 Iowa, 88). This decision is interesting because the effect of a broad Enabling Act was considered, and it was nevertheless held that the wife could not recover. Although one member of the court dissented, we think there would be a preponderating weight of professional opinion in favor of the view that contracts for compensation for services of a strictly personal nature, such as care and nursing during sickness, would be contrary to public policy.

With regard to purely domestic services, the authority relied on by Mr. Schouler is Randall v. Randall, 37 Mich. 564. In this case, Judge Cooley, in the course of argument, laid down the proposition that a wife's obligation to render family services is co-extensive with the husband's to support her in the family. While the disability of a wife to contract for payment for domestic services is not so clear as for personal services, probably the better practical rule is to deny the right to pecuniary compensation in both cases. The wife is entitled to board, lodging, clothing, medical attendance; in short, general equality of privilege with the husband, according to the particular circumstances of the given case. Her obligation is to render domestic services to the best of her ability, also having in view the special circumstances. It would be, as Mr. Schouler suggests, impossible to strike an accurately just balance. Another practical consideration is that claims for compensation for domestic services, under alleged contracts between husband and wife, would constantly be resorted to as a cover for fraud.

While, however, denial of the right of contractual capacity between husband and wife, as to domestic as well as personal services, is sufficiently justified in theory, as well as practically expedient, it would seem that such marital disqualification should be limited to the affairs of strictly family life. Where housekeeping is conducted as a business, as, for instance, where boarders are taken, either spouse, who is the responsible proprietor, ought to be permitted to contract and be liable to pay for the services of the other.—*New York Law Journal.*

BOOKS RECEIVED.

The French Civil Code, with the Various Amendments thereto as in force on March 15, 1895. By Henry Cachard, B. A., and Counselor at Law of the New York Bar, *licencie en droit de la faculte de Paris.* Banks and Brothers, Law Publishers and Booksellers. New York and Albany. 1895.

Commentaries on the Law of Private Corporations. By Seymour D. Thompson, LL. D. In six volumes. Volume V. San Francisco. Bancroft-Whitney Company. 1895.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE—Conditions of Policy.—Voluntary exposure to unnecessary danger, conditioned by an accident policy to relieve the insurer from liability, is intentional exposure to danger, as where one acts so recklessly and carelessly as to show an utter disregard of a known danger, or does an act in the face of a risk of danger so obvious that a prudent man, exercising reasonable foresight, would not have done it.—DE LOY v. TRAVELERS' INS. CO. OF HARTFORD, Penn., 32 Atl. Rep. 1108.

2. ACCIDENT INSURANCE — Exposure to Unnecessary Danger.—Going out on water in a boat to fish on a dark night, without knowledge that snags are there, is not an exposure to "unnecessary danger," within a provision in an accident policy exempting the insurer from liability for injuries from "voluntary exposure to unnecessary danger."—COLLINS v. BANKERS' ACC. INS. CO., Iowa, 64 N. W. Rep. 778.

3. ACKNOWLEDGMENT — Sufficiency.—The requirement that a certificate of acknowledgment should state that the person making it was known to the notary is not satisfied in a certificate of acknowledgment by a married woman stating that she appeared in person, that she was the same party who signed the instrument, and that she was the wife of the one who signed with her.—BEITEL v. WAGNER, Tex., 32 S. W. Rep. 366.

4. ADMINISTRATION — Administrator's Bond.—One who has satisfied a judgment recovered against him by an administrator may, on the subsequent reversal of the judgment on appeal, recover the amount so paid from a surety on the administrator's bond without obtaining a judgment against the administrator.—SMOOT'S ADM'RS v. BIGSTAFF, Ky., 32 S. W. Rep. 410.

5. ADMINISTRATION — Interest — Claims.—Interest on sums to be paid annually in lieu of dower should be allowed from the time the installments fall due, there being no evidence that the widow has waived her right to receive them when payable.—IN RE SEITZINGER'S ESTATE, Penn., 32 Atl. Rep. 1101.

6. ADVERSE POSSESSION — Title to Railroad Land.—Act Cong. July 27, 1866, granting lands in aid of the construction of a railroad, operated to vest title as soon as the map locating the proposed route was filed in the general land office, and said lands then became subject to the laws of adverse possession, and the effect of such possession was not interrupted by the subsequent issuance of a patent therefor to the railroad company.—SOUTHERN PAC. R. CO. v. WHITAKER, Cal., 41 Pac. Rep. 1083.

7. ADVERSE POSSESSION — Uninclosed Land.—A person in possession of land, under a deed purporting to convey a fee, only a portion of which he had inclosed, may claim by adverse possession to the extent of the boundaries of the deed, the true owner not showing any possession of the portion of the land not inclosed.—HEBARD v. SCOTT, Tenn., 32 S. W. Rep. 390.

8. APPEAL—Bond.—2 How. Ann. St. §§ 7018, 7020, providing that no appeal shall be dismissed for any imperfection in the bond provided a new bond is given, cannot be invoked where the party does not offer to substitute a new bond.—COLE v. DONOVAN, Mich., 64 N. W. Rep. 741.

9. ARREST WITHOUT WARRANT—False Imprisonment.—In the absence of any statutory power or authority, a sheriff, constable, or other peace officer, may arrest, without process, a person whom he has reasonable cause to believe guilty of a felony, and detain him a

reasonable time, until a warrant can be procured. Such officer is justified in arresting, without a warrant, for a felony, even though he has no personal knowledge of the guilt of the accused, if the officer, in good faith, acted upon information received from others, upon whom he had reason to, and did, rely, although it should subsequently turn out that the one so arrested was not guilty.—DIERS v. MALLON, Neb., 64 N. W. Rep. 722.

10. ASSIGNMENT OF CHOSE IN ACTION.—As between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, though he has given no notice of such assignment to either the subsequent assignee or the debtor.—FORTUNATO v. PATTEN, N. Y., 41 N. E. Rep. 572.

11. ASSUMPSIT.—One for whose benefit an advertisement was published must pay therefor, where he had knowledge of the publication, and made no objection thereto.—STUCKEY v. HARDY, Ind., 41 N. E. Rep. 606.

12. ATTACHMENT—Attacking Assignment.—In an action of attachment, wherein an assignee intervened, claiming the property under a deed of assignment from defendant, it may be shown that certain creditors were preferred, and that the assignment was void, and therefore the property subject to attachment.—BRADLEY v. BAILEY, Iowa, 64 N. W. Rep. 758.

13. ATTORNEY AND CLIENT — Compensation—Counsel for Receivers.—Counsel for the receivers of a defunct corporation are not entitled to a compensation of 5 per cent. on the amount of money which came into the receivers' hands for the benefit of creditors and stockholders, where such amount has not, in any sense, been realized by reason of his services. He is entitled only to a reasonable compensation for the services actually performed.—WALTERS v. WESTERN & A. R. CO., U. S. C. C. (Ga.), 69 Fed. Rep. 706.

14. BANK AS COLLECTING AGENT.—A bank which has received a check for collection is not made liable to the drawee for its amount by the fact that, upon protest of the check for non-payment, it has accepted from the maker thereof a check upon another bank, payable to the order of its cashier,—the drawee of the first check being absent from the city,—which latter check is also protested for non-payment.—CITIZENS' BANK OF PARIS v. HOUSTON, Ky., 32 S. W. Rep. 397.

15. BANKS AND BANKING—Insolvency—Preferences.—A depositor who receives an ordinary certificate of deposit, and whose money is mingled with the other funds of a bank, is not entitled, on the insolvency of the bank, to any preference over other creditors, even though the banker promised him to keep his money separate from the other funds.—BAYOR v. AMERICAN TRUST & SAVINGS BANK, Ill., 41 N. E. Rep. 622.

16. BUILDING AND LOAN ASSOCIATIONS—Redemption.—In a suit by members of a loan association for an accounting between them and the association, and to be allowed the privilege of redeeming its loan to them, the court, after having had an account stated, should render its decree against complainants for the amount found to be due from them, name some reasonable day for its payment, and order the property sold on default.—RICKS v. DURANT BUILDING & LOAN ASS'N, Miss., 18 South. Rep. 359.

17. CARRIERS—Bill of Lading.—While a bill of lading which is silent as to the time of delivery is held to contain an implied obligation to deliver in a reasonable time, and this obligation cannot be varied by parol evidence, yet, for the purpose of affecting the measure of damages, it is competent to show by parol that notice was brought home to the carrier that unusual loss would result from delay in making the delivery.—CENTRAL TRUST CO. OF NEW YORK v. SAVANNAH & W. R. CO., U. S. C. C. (Ga.), 69 Fed. Rep. 683.

18. CARRIERS—Liability for Loss of Goods.— By the common law rule, common carriers are held to a very strict accountability for the loss of goods received for carriage; such accountability being independent of contract, and imposed by law on grounds of public policy and commercial necessity, for the protection of the owner of the goods.—CLYDE STEAMSHIP CO. v. BURROWS, Fla., 18 South. Rep. 349.

19. CARRIERS—Passengers—Negligence.—A railroad company is only required to use ordinary and reasonable care in lighting its depot platform, so that persons may use the same in going to or from the trains with reasonable safety.—HIATT v. DES MOINES, N. & W. RY. CO., Iowa, 64 N. W. Rep. 766.

20. CHATTEL MORTGAGE—Delivery.—A chattel mortgage, executed without the knowledge of the mortgagee, delivered to a third person, and by him recorded, is void, for want of delivery, as against a subsequent purchaser of the goods on execution against the mortgagor.—MCFADDEN v. ROSS, Ind., 41 N. E. Rep. 607.

21. CHATTEL MORTGAGE—Property Covered.—A chattel mortgage on "all the fixtures" contained in a certain store covers show cases counters, and a wall case, and parol testimony is admissible to identify them.—MYERS v. SNYDER, Iowa, 64 N. W. Rep. 771.

22. CHATTEL MORTGAGE—Recording.— Under Sayles' Civ. St. art. 3190b, providing that a chattel mortgage not accompanied by change of possession shall be void, as to creditors, unless recorded in the county where the property is situated, or in the county of the mortgagor's residence, if he is a resident of the State, the record of a chattel mortgage in the county where the mortgagor resided at the time of its execution and registration is notice to all persons dealing with the property, though it is situated in another county, and there was no change of possession.— OXSHEER v. TANDY, Tex., 32 S. W. Rep. 372.

23. CONSTITUTIONAL LAW—Farm Crossings.—Act March 23, 1887, requiring railroad companies to make farm crossings within the inclosures of private individuals, is unconstitutional in so far as it applies to companies who have secured, either by purchase or condemnation, rights of way, and fenced their track, prior to the passage of the act.—SAN ANTONIO & A. P. RY. CO. v. BELL, Tex., 32 S. W. Rep. 374.

24. CONSTITUTIONAL LAW—Occupation Tax.— Const. art. 12, § 1, provides that the legislature shall levy a uniform rate of assessment and taxation, and, in another sentence, provides that the legislature shall impose a license tax on persons or corporations doing business in the State. Section 11 provides that taxes shall be uniform: Held, that such licenses need not be uniform.—STATE v. FRENCH, Mont., 41 Pac. Rep. 1078.

25. CONSTITUTIONAL LAW—Official Ballots.— St. 1893, ch. 417, requiring the use of official ballots at elections, does not conflict with the constitution (Declaration of Rights, art. 9), declaring that "all election ought to be free; and all inhabitants have an equal right to elect officers, etc.—COLE v. TUCKER, Mass., 41 N. E. Rep 681.

26. CONSTITUTIONAL LAW—Taxation of Bank Stock.—The fact that Acts 23d Gen. Assem. ch. 39, § 1, provides that the shares of capital stock of State banks shall be assessed to the banks, and not to the individual shareholders, while Code, §§ 818, 819, provide that national bank stock shall be assessed as the personal property of the owner, does not render the same void, as in violation of Const. art. 1, § 6, providing that general laws shall have a uniform operation. — PRIMGHAR STATE BANK v. RERICK, Iowa, 64 N. W. Rep. 801.

27. CONTRACT—Construction.—It is the duty of the court, in construing a written instrument, to give effect to every clause therein, if it can be done consistently with the intention of the parties, and language in one clause should not be construed as superfluous merely because an implication of law arising from another clause would indicate that it was not necessary.—FIRST NAT. BANK OF FLORIDA v. SAVANNAH, ETC., RY. CO., Fla., 18 South. Rep. 345.

28. CONTRACT — Construction — Penalty.—Where the lease of patented machines provides for royalty at cer-

tain rates payable monthly, but declares that, if paid before the 15th of each month, a discount of 50 per cent. will be allowed, royalty can only be collected at half the specified rates, it being evident that the other half is merely a penalty for delay.—GOODYEAR SHOE-MACH. CO. v. SELZ, SCHWAB & CO., Ill., 41 N. E. Rep. 625.

29. CONTRACT—Option—Revocation—Acceptance.—An option of a contract for the sale of oil without consideration paid may be withdrawn at any time before acceptance.—BOSSHARDT & WILSON CO. v. CRESCENT OIL CO., Penn., 32 Atl. Rep. 1120.

30. CONTRACT — Rescission—Insolvency.—A, a corporation, entered into a contract with B that B should, at his own expense, erect and operate a soda fountain in the store of A, and that B should receive 85 and A 15 per cent. of the gross receipts, and that the contract should exist for five years: Held, that the contract was not rescinded by a decree that A was insolvent.—BOLLES v. CRESCENT DRUG & CHEMICAL CO., N. J., 32 Atl. Rep. 1061.

31. CONTRACT BY SEPARATE FIRMS—Construction.—Where a contract for the use of electrotype plates was made by defendants with plaintiff individually, and plaintiff afterwards formed a partnership with his sons, without the knowledge of defendants, plates furnished thereafter will, as between the parties, be considered as furnished by plaintiff individually through the medium of the partnership. — MEYER v. ESTES, Mass., 41 N. E. Rep. 683.

32. CORPORATIONS—Agent of Foreign Corporation.—3 How. Ann. St. § 4161d, added to the general act providing for incorporation of domestic manufacturing companies, provides that foreign corporations organized for any of the purposes contemplated by the act referred to, on recording copies of their charter, and filing a resolution authorizing an agent to acknowledge service of process for the company, and appointing such an agent, may carry on business in the State, and enjoy all the rights, and be subject to all the restrictions, of corporations existing under said act: Held, that this did not prohibit foreign corporations from doing business in the State, or make their contracts within the State illegal, but merely imposed conditions in case they desired the benefit of the law applicable to domestic corporations of similar character.—PEOPLE v. HAWKINS, Mich., 64 N. W. Rep. 737.

33. CORPORATIONS — Corporation as Stockholder.—Under articles authorizing a corporation to "loan money on real estate, chattel, or personal security; to buy, hold, sell, and transfer notes, bonds, mortgages, and other securities and evidences of indebtedness; to make contracts; to acquire and transfer property, possessing the same power in such respects as private individuals now enjoy,"—it may accept stock in another company as collateral security for signing a note for the latter on which money was obtained for the latter's use.—CALUMET PAPER CO. v. STOTTS IM. CO., Iowa, 64 N. W. Rep. 782.

34. COVENANT—Incumbrances—Right of Way.—In an action for breach of covenant against incumbrances, it appeared that land conveyed by defendant was subject to a right of way in favor of third persons, who recovered damages from plaintiff for encroaching on the way with buildings. Oral notice of the actions against plaintiff was given to defendant's husband, who had control of her land, but there was no evidence of notice to defendant: Held, that defendant was not bound by the assessment of damages in such actions.—RICHMOND v. AMES, Mass., 41 N. E. Rep. 671.

35. CRIMINAL EVIDENCE — Conspiracy.—Declarations of a conspirator, made after the conspiracy has terminated, are not admissible against a co-conspirator.—WAGNER v. AULENBACH, Penn., 32 Atl. Rep. 1087.

36. CRIMINAL LAW—Gaming.—One who operates for another, at a fixed salary, a device known as a "six wheel," whereby money is won or lost, though he has no interest in the affair further than his salary, guilty of a misdemeanor, under Mill. & V. Code, § 5688, making it a misdemeanor to play at any game of hazard for money, and under *Id.* § 5689, making one guilty of the same offense who aids or assists in keeping or exhibiting any gaming device. — ATKINS v. STATE, Tenn., 32 S. W. Rep. 391.

37. CRIMINAL PRACTICE—Larceny—Indictment.—Under Rev. St. 1894, § 2007 (Rev. St. 1881, § 1934), making the felonious taking of the property of another larceny, an indictment alleging that defendant "feloniously" took the property of another is a sufficient allegation that he took with it the intent to deprive the owner of it.—HAMILTON v. STATE, Ind., 41 N. E. Rep. 588.

38. DEATH BY WRONGFUL ACT.—The right of action given by How. Ann. St. §§ 8313, 8314, to an administrator for the death by wrongful act of his decedent, constitutes assets of the estate of a non-resident killed within the State, sufficient to grant administration thereon, under section 5848, providing that administration may be granted if a non-resident decedent leaves "estate" within the estate to be administered.—FINDLAY v. CHICAGO & G. T. RY. CO., Mich., 64 N. W. Rep. 732.

39. DEDICATION—What Constitutes.—Where the owners of land made a map thereof, intending that a certain block should be dedicated to the town, but, before the map was recorded or the county organized, said owners, in order to make the town the county seat, erected a building on said block for a courthouse and jail, and afterwards conveyed the block to the county, which took possession thereof, and it did not affirmatively appear that any lots were sold according to said map, or that there was any acceptance by the town before the dedication to the county, there was no irrevocable dedication to the town.—UVALDE COUNTY v. CITY OF UVALDE, Tex., 32 S. W. Rep. 368.

40. DEED—Action to set Aside.—Where the only evidence showing a deed to be a forgery is that of the husband of the grantor, and he is shown to have admitted that the deed was genuine, and to have permitted it to be used for his profit, and his testimony is directly contradicted by the notary before whom the deed purports to have been acknowledged, a finding that the deed is a forgery is not supported by the evidence.—BROWN v. HOLTZMAN, Ill., 41 N. E. Rep. 611.

41. DEED—Cancellation.—One who conveyed a right of way to a railroad company in consideration of the construction of the road through the county, cannot, after the road is constructed and in operation, have the conveyance canceled merely because, after the right of way was procured, it was conveyed to another company pursuant to a previous agreement to construct the road, in consideration of a right of way through the county and a specified amount as a *bonus*.—GRUNDY v. LOUISVILLE & N. R. CO., Ky., 32 S. W. Rep. 392.

42. DEED—Delivery.—Evidence that the grantee in a deed delivered in escrow obtained possession thereof, for examination, on the order of the grantor, and, without the grantor's knowledge, placed the same on record, and that the grantor had frequently demanded the deed from the grantee, warrants a finding of nondelivery of the deed.—PUCKETT v. WILLIAMS, Tex., 32 S. W. Rep. 364.

43. DEED—Delivery.— Presumption.—Where a deed purports to have been acknowledged several days after its date, the presumption is that it was delivered as well as made on the day of its date.—SMITH v. SCARBOROUGH, Ark., 32 S. W. Rep. 382.

44. DESCENT AND DISTRIBUTION—Homestead.—Code, § 2008, provides that, if there be no survivor, the homestead shall descend to the issue of either husband or wife, exempt from any debt of their parents or their own. *Id.* § 2441, provides that the distributive share of the widow shall be so set off as to include the ordinary dwelling house given by law to the homestead, or so much thereof as will be equal to the share

allotted to her, unless she prefers a different arrangement; but no different arrangement shall be permitted where it would have the effect of prejudicing the rights of creditors. *Id.* § 2440, provides that the right of a surviving husband shall be the same as that of a surviving wife: Held, that a surviving husband is not obliged to take his distributive share so as to include the homestead, and the homestead will descend to the issue of the deceased free from the claims of her creditors.—IN RE COULSON'S ESTATE, Iowa, 64 N. W. Rep. 755.

45. DESCENT AND DISTRIBUTION—Legitimacy.—Where a person, after his second marriage, lived in the town where the first wife lived, and the latter never questioned the validity of the second marriage, nor the legitimacy of the issue thereof, the presumption is that the parties to the first marriage were divorced before the second marriage, and that the issue of each marriage will inherit from their father.—LEACH V. HALL, Iowa, 64 N. W. Rep. 790.

46. DIVORCE—Cross-bill—Alimony.—Where, in an action for divorce, defendant's application for alimony is pending before a referee, the plaintiff is not entitled, as a matter of course, on payment of costs, to have his bill dismissed.—CLUTTON V. CLUTTON, Mich., 64 N. W. Rep. 744.

47. ELECTION CONTEST—Ballots.—In an election contest the court refused to allow ballots introduced in evidence to be incorporated into the bill of exceptions, on the ground that he had not ordered them to be marked as exhibits in the case. It appeared elsewhere in the bill of exceptions that the ballots were marked as exhibits, with the knowledge of the court, and that the court had ordered the clerk to preserve the ballots, and seal them up: Held that, since the ballots could be identified with certainty, plaintiff is entitled to have them certified to the Supreme Court.—JENNINGS V. BROWN, Cal., 41 Pac. Rep. 1085.

48. EMINENT DOMAIN — Railroad Companies. — The owner of land facing on a street, which street has been openly and exclusively in the possession of a railroad company all the time he owned said land, and for many years before he bought it, has no right of action against the railroad company for trespass, since the alleged trespass occurred before he bought, and it is presumed that the price of the land was adjusted with reference to the proxmity of the railroad.—GALT V. CHICAGO & N. W. RY. CO., Ill., 41 N. E. Rep. 643.

49. EMINENT DOMAIN — Street Across Railroad. — Where a municipality extends a street across a strip of land owned by a railroad company and only used for it as a right of way, only nominal compensation is recoverable, since the company still retains the right to use the land as before, and the possibility of its using part of the land for other purposes is purely speculative.— CHICAGO & N. W. R. CO. V. TOWN OF CICERO, Ill., 41 N. E. Rep. 640.

50. EVIDENCE.—In a suit against an insurance company, on proof of written notice received by defendant, in due course of mail, from plaintiff, to produce at the trial of the suit against it by plaintiff all letters received by it from plaintiff relating to the subject matter of the suit, from the date of the fire to the date of notice,—a period of 16 months,—secondary evidence of such letters is admissible, if the originals are not produced.—MCDOWELL V. ÆTNA INS. CO., Mass., 41 N. E. Rep. 665.

51. EVIDENCE — Parol.—Where the written order for the purchase of mill machinery is silent as to an agreement that the seller shall furnish mill rights and put up the machinery within a specified time, parol evidence is admissible to show such agreement.—JOHN HUTCHINSON MANUF'G CO. V. PINCH, Mich., 64 N. W. Rep. 729.

52. EVIDENCE — Privileged Communications.—The fact that a husband is a party defendant to a suit by his wife to enforce a lien for taxes paid under a void tax deed does not render inadmissible evidence of an agreement made by him as her agent with the holder of the legal title, by which she was to receive the rents and profits, and out of them repay sums paid by her for the tax deed and other taxes.—HARLESS V. HARLESS, Ind., 41 N. E. Rep. 592.

53. EXECUTION—Lien.—It is essential that an execution should not only be issued, but actually levied upon the lands of the defendant, in order to give a subsequent judgment creditor a preference over a prior judgment creditor who has failed to issue an execution upon his judgment.—LARISON V. DILTS, N. J., 32 Atl. Rep. 1059.

54. FEDERAL COURTS—Corporation of Several States.—A corporation formed by the consolidation of corporations of three different States, pursuant to the laws thereof, is, within each of such States, a corporation of that State; and the Federal courts there held have no jurisdiction of a suit against it by a citizen of the State, on the ground of diverse citizenship.—MISSOURI PAC. RY. CO. V. MEEH, U. S. C. C. of App., 65 Fed. Rep. 752.

55. FEDERAL COURTS—Foreign Insurance Companies.—A foreign insurance company which, in compliance with the laws of a State, has appointed an agent therein upon whom service may be made (Pol. Code Cal. § 616), is to be considered an "inhabitant" of the State within the meaning of the judiciary act of 1887-88, and may be sued therein in the Federal courts.—SHAINWALD V. DAVIDS, U. S. D. C. (Cal.), 69 Fed. Rep. 704.

56. FEDERAL OFFENSE — Territorial Statutes.—The Act of Congress of March 3, 1887, for the punishment of bigamy and similar offenses, including incest, in the territories, did not, by implication, repeal the territorial statute of Washington relating to the crime of incest. It merely superseded it until the territory was admitted as a State, whereupon the act of congress ceased to operate, and the territorial statute, by virtue of the State constitution, became the law of the State.—IN RE NELSON, U. S. D. C. (Wash.), 69 Fed. Rep. 712.

57. FRAUDULENT CONVEYANCES.—Where a chattel mortgage was executed to plaintiff to protect him as surety on the mortgagor's note, and after plaintiff paid the note the mortgagor executed to him a bill of sale of the property, if the consideration for the bill of sale was the same as that for which the mortgage was given, and the mortgage was held from record to benefit the credit of the mortgagor, it was fraudulent as to creditors of the mortgagor after the execution of the mortgage.—SNOUFFER V. KINLEY, Iowa, 64 N. W. Rep. 770.

58. GARNISHMENT.—A suit is commenced, within the meaning of How. Ann. St. § 8058, so as to authorize the issuance of a writ of garnishment, when the declaration is filed, though defendant has not been served with process.—MCDONALD V. ALANSON MANUF'G CO., Mich., 64 N. W. Rep. 730.

59. GARNISHMENT — Debts—Subject.—In garnishment there was evidence warranting a finding that the garnishee, who was indebted to defendant on a contract for iron, had accepted drafts drawn by the latter, and had placed them in the hands of an employee, with directions to hold them till ordered by the garnishee to turn them over to defendant: Held, that this was not a delivery of the drafts, and that the debt due from the garnishee remained a contract debt, subject to garnishment.—LEHIGH COAL & IRON CO. V. WEST SUPERIOR IRON & STEEL CO., Wis., 64 N. W. Rep. 746.

60. GUARANTY—Lease.—An agreement between landlord and tenant, that the latter should make certain improvements on the demised premises, and that the landlord should credit him therefor a certain sum in lieu of the rent, is not such an alteration of the terms of the lease as will release a guarantor of the rent who did not consent to such agreement.—MORRILL V. BAGGOTT, Ill., 41 N. E. Rep. 639.

61. GUARANTY—What Constitutes.—Whether an engagement is a collateral agreement or an original undertaking is often a question of difficulty; but when the promise is to do a particular thing, which another

is bound to perform in the event he does not do it, the obligation is regarded as an original undertaking, and not a strict or collateral guaranty.—FRANK V. WILLIAMS, Fla., 18 South. Rep. 351.

62. GUARDIAN AND WARD—Minor's Support.—The guardian of a minor who has property, may, without leave of court, pay to his ward's widowed mother reasonable charges for the child's support; the reasonableness of the payments to be determined on the guardian's accounting.—MELANEFY V. O'DRISCOLL, Mass., 41 N. E. Rep. 654.

63. HOMESTEAD RIGHT — Royalty from Coal Mined.—Royalty due a homesteader from coal mined on the homestead is subject to the homesteader's debts.—F. F. COLLINS MANUF'G CO. V. CARR, Tex., 32 S. W. Rep. 366.

64. HUSBAND AND WIFE—Bank Deposit.—A husband sued by the receiver of an insolvent bank on a note given by him to the bank may set off against plaintiff's claim one for the amount of a deposit made by his wife to her credit before the bank became insolvent, where it appears that the deposit was not her separate estate, although Gen. St. art. 4, ch. 52, § 16, provides that married women may make deposits in banking institutions, and that their checks shall be as valid as if they were not married.—HALL V. NEW FARMERS' BANK'S TRUSTEE, Ky., 32 S. W. Rep. 400.

65. HUSBAND AND WIFE—Community Property—Sale by Surviving Husband.—The burden is on the purchaser of community property from a surviving husband to show circumstances authorizing the sale, and where such purchaser knew, at the time of the purchase, not only that the property was not sold to pay community debts, but to pay the individual debts of the vendor, he takes no title as against the wife's heirs.—EASTHAM V. SIMS, Tex., 32 S. W. Rep. 359.

66. INSURANCE—Assignment.—A policy of insurance is a contract of indemnity, personal to the party to whom it is issued, or for whose interest the insurer undertakes to be responsible in case of loss, and cannot be transferred to a third person, so as to be valid in his hands against the insurer, without the insurer's consent.—KASE V. HARTFORD FIRE INS. CO., N. J., 32 Atl. Rep. 1057.

67. INSURANCE—Notice and Proof of Loss.—Notice of loss under a fire policy, sent by a local agent of the company on information furnished by the insured, is sufficient. — BURLINGTON INS. CO. V. LOWERY, Ark., 32 S. W. Rep. 353.

68. INSURANCE—Representations of Agent.—When a policy of insurance describes the class of risks thereby insured, and the assured has a fair opportunity to read the instrument, the company issuing the same will not be bound by representations made by its agent, in good faith and without any intent to deceive or to defraud, that the policy covers certain risks that are not in fact within its provisions. In construing the provisions of a written agreement, and in determining its legal effect, the parties thereto act at arm's length, if the agreement is couched in plain language, and no fraud or deceit is practiced.—TRAVELERS' INS. CO. OF HARTFORD V. HENDERSON, U. S. C. C. of App., 69 Fed. Rep. 762.

69. INTOXICATING LIQUORS—Distillers' License.—Ky. St. § 4203, requiring 10 days' notice of an application for a license to sell spirituous liquors at retail, and providing that, if a majority of the legal voters in the neighborhood protest, the application shall not be granted, applies to applications by "distillers," the conditions of whose licenses are enumerated in section 4205.—COMMONWEALTH V. HAWKINS, Ky., 32 S. W. Rep. 409.

70. JUDGMENT.—Where the fact that all the joint plaintiffs are not entitled to recover is not apparent on the face of the complaint, but appears from the evidence, those plaintiffs in whose favor a cause of action is shown are entitled to judgment, under Rev. St. 1894, § 577 (Rev. St. 1881, § 568), providing that judgment may be given for or against one or more of several plaintiffs.—LOUISVILLE, N. A. & C. RY. CO. V. LANGE, Ind., 41 N. E. Rep. 609.

71. JUDGMENT— Transcript — Limitations. —Limitations begin to run against the docket entry, authorized by How. Ann. St. § 6948, of a transcript of a justice's judgment on the records of the Circuit Court, from the date of the entry of the justice's judgment, and not from the date of the entry of the transcript.—WILCOX V. LANTZ, Mich., 64 N. W. Rep. 735.

72. LANDLORD AND TENANT.—A tenant for years, who hold over after expiration of his term, does not become a tenant for another year, unless the landlord so elects.—CONDON V. BROCKW. Y, Ill., 41 N. E. Rep. 634.

73. LANDLORD AND TENANT—Rent.—In an action for rent it is only necessary to prove the contract and possession, not the beginning or termination of the tenancy.—ROGERS V. COY, Mass., 41 N. E. Rep. 652.

74. LANDLORD AND TENANT—Assignment of Lease.—A lessee for a term of years at a monthly rent erected buildings upon the premises, and then, for a present consideration, underlet for the balance of his term, reserving the same rent as that reserved in his lease, and took back a chattel mortgage, duly recorded as such, from the subtenant, upon the lease and buildings to secure the consideration of the sublease. The subtenant surrendered the term to the principal landlord: Held, that the sublease amounted to an assignment of the original lease, and that the surrender was void as to the holder of the mortgage.—FIRTH V. ROWE, N. J., 32 Atl. Rep. 1064.

75. LIEN—Assignment of Lien.—One holding a lien for material furnished on running account, one for material furnished on special contract after the running account was closed, and one as assignee, all of which arise under the same statute, against the same boat, and are between the same parties, may enforce them all in the same action.—THE VICTORIAN NUMBER TWO, Oreg., 41 Pac. Rep. 1103.

76. LIFE INSURANCE—Insurance Association.—A fraternal and benefit association that requires, for membership, no medical examination, unless a benefit certificate is desired and such members are required to pay assessments based on their age, with additional assessments, from time to time, on death losses, is, as regards its beneficial object, an insurance company, subject to the provisions of McClain's Code, § 1733, that "all insurance companies or associations" shall attach to the policy a copy of any application which, by the terms of the policy, is made a part thereof, or affects the validity of the policy, an omission to do which shall preclude the insurer from relying on the application as a defense to the policy.—GRIMES V. NORTHWESTERN LEGION OF HONOR, Iowa, 64 N. W. Rep. 806.

77. LIFE INSURANCE—Misrepresentation.—Under St. 1887, ch. 214, § 21, providing that no misrepresentation made in the negotiation of insurance shall avoid the policy, unless such misrepresentation was made with intent to deceive, or the matter misrepresented increased the risk or loss, a misrepresentation, in an application for insurance, that the application did not have a certain disease, will not avoid the policy, if the jury find that such misrepresentation did not increase the risk, and was not made with intent to deceive.—HOGAN V. METROPOLITAN INS. CO., Mass., 41 N. E. Rep. 663.

78. LIMITATIONS— Amendment.— Where an original bill to reform a deed and obtain possession of land contains no claim for *mense* profits, but *mense* profits are claimed in an amendment to the bill, the statute of limitation bars all profits accruing more than five years before the amendment was filed, since an amendment setting up a new cause of action does not relate back to the original bill. — HAWLEY V. SIMONS, Ill., 41 N. E. Rep. 616.

79. MARINE INSURANCE—Contract.—Where a contract is made to insure a cargo to a certain amount, at a

reasonable rate of premium, till the facts necessary to determine premium to be charged, and the amount for which a policy will be issued, can be determined by the applicant, and sent to the insurer, failure of the applicant to send such information without unreasonable delay to the insurer, after receiving it, avoids the contract.—SCAMMELL v. CHINA MUT. INS. CO., Mass., 41 N. E. Rep. 649.

80. MARRIED WOMAN—Gift of Land.—Under the statute declaring that a transfer of land belonging to a married woman can be made by a deed of the husband and wife with a separate acknowledgment by the wife, a married woman who makes a parol gift of land is not estopped from revoking it by admitting title in the grantee, and allowing him to remain in possession for several years, unless some deceit practiced on such grantee is also shown.—ROBERT v. EZELL, Tex., 32 S. W. Rep. 362.

81. MARSHALING ASSETS—Estoppel.—The right of a loan association which had taken an assignment of a member's shares of stock, as collateral security for a loan for which the member had also given a mortgage, to appropriate such shares, at their maturity, to the satisfaction of the loan, instead of exhausting the security furnished by the mortgage, is not affected by an attachment of the stock by a judgment creditor of the member.—HEMPERLY v. TYSON, Penn., 32 Atl. Rep. 1081.

82. MASTER AND SERVANT—Negligence—Vice-principal.—In an action for personal injuries received while blasting rock, it was error to refuse to charge that there was no evidence of negligence in the selection of a superintendent or workmen employed on the work, where the only testimony on that point was given by the superintendent, who stated that, though he had never had charge of dynamite blasting, he knew how it ought to be done.—O'NEIL v. O'LEARY, Mass., 41 N. E. Rep. 662.

83. MASTER AND SERVANT—Vice-principal.—The train dispatcher of a railroad company in the possession of receivers is the *alter ego* of the receivers, in respect to a locomotive engineer injured through his negligence in directing the running of trains.—CLYDE v. RICHMOND & D. R. CO., U. S. C. C. (Ga.), 69 Fed. Rep. 673.

84. MASTER AND SERVANT—When Relation Exists.—A manufacturing company employed a carpenter under a continuing contract to make all repairs and alterations which it determined upon to its works, he to furnish tools, and the company the materials, at $2.50 per day for his own services and 25 cents profit on each man employed by him. The carpenter hired, paid, superintended, and discharged the men employed by him, but the company directed how the work was to be done: Held, that a man hired by the carpenter was an employee of the carpenter, and not of the company, within St. 1887, ch. 270, regulating the liability of masters to servants.—DANE v. COCHRANE CHEMICAL CO., Mass., 41 N. E. Rep. 678.

85. MINING LEASE — Construction.—A joint lease for mining purposes, executed by owners in severalty of two adjoining tracts, provided that the lessee should pay as royalty a certain sum monthly to the lessors. One of the lessors subsequently conveyed his separate tract to the lessee: Held, that the remaining lessor was entitled to royalty thereafter in an amount equal to the value of his distinct tract as compared with that conveyed to the lessee.—HIGGINS v. CALIFORNIA PETROLEUM & ASPHALT CO., Cal., 41 Pac. Rep. 1087.

86. MORTGAGE FORECLOSURE—Deficiency Judgment.—A deficiency judgment may be had against a grantee of mortgaged premises, who, accepts the conveyance subject to the mortgage, and assumes the payment of the mortgage debt.—TULARE COUNTY BANK v. MADDEN, Cal., 41 Pac. Rep. 1092.

87. MUNICIPAL CORPORATIONS—Assessment—Taxation.—A property owner, who has appeared in proceedings to confirm a special assessment for a local improvement, which proceedings have resulted in a judgment of confirmation, cannot, in the absence of fraud, afterwards object to the collection of the assessment on the ground that the improvement was not made in accordance with the ordinance ordering it.—FISHER v. PEOPLE, Ill., 41 N. E. Rep. 615.

88. MUNICIPAL CORPORATIONS—Injuries to Prisoner.—A municipal corporation is not liable for negligently maintaining its lockup or prison in a defective and unfit condition, by reason of which a prisoner confined therein is injured.—GULLIKSON v. MCDONALD, Minn., 64 N. W. Rep. 812.

89. MUNICIPAL CORPORATION — Member of Council—Contested Election.—The determination by a council of the contested election of a member of its body cannot be reviewed on error.—STEARNS v. VILLAGE OF WYOMING, Ohio, 41 N. E. Rep. 578.

90. MUNICIPAL CORPORATION — Paving.—Abutting property, being liable for the expense of the first paving only, on a street, is not liable for further paving where a highway, having been macadamized, is assimilated with the rest of a city's streets, and for many years recognized and treated by it as a paved street.—LEAKE v. CITY OF PHILADELPHIA, Penn., 32 Atl. Rep. 1110.

91. MUNICIPAL CORPORATION—Street Railway—Regulation—Fares.—Under Const. art. 11, § 11, allowing any city to make and enforce "within its limits" any regulations not in conflict with the general laws; and Civ. Code, § 470, prohibiting a railroad from using a public street of a city unless the right so to use it is granted by two-thirds vote of the city authorities,—a provision in a city ordinance granting a railway right of way on its streets, regulating fares to be charged outside of the limits of the city, is void.—CITY OF SOUTH PASADENA v. LOS ANGELES TERMINAL RY. CO., Cal., 41 Pac. Rep. 1093.

92. NEGLIGENCE — Contributory Negligence.—On a clear winter night plaintiff was driving, at a gentle trot, along a highway, which ran parallel with defendant's railroad track, and about 12 feet therefrom, on an open prairie, across which an approaching train could be seen at a distance of a mile or more. Plaintiff knew that a train was soon to approach from behind him on the railroad, and that his horse, though gentle, would require some care in management when the train passed him; but though so muffled in a coat to protect him from the cold that he could not hear easily, he did not look for the train, and when it approached him his team collided with it, his horse was killed, and his wagon broken: Held, that it was not error to direct a verdict for the defendant on the ground of plaintiff's contributory negligence.—REYNOLDS v. GREAT NORTHERN RY. CO., U. S. C. C. of App., 69 Fed. Rep. 808.

93. NEGLIGENCE—Fires.—Under Code, § 3890, making the person setting fire to prairie land, and allowing it to escape beyond control, liable for resulting injuries, one will not be liable where a fire was started for a lawful purpose, and escaped without negligence, setting fire to prairie land.—ELLSWORTH v. ELLINGSON, Iowa, 64 N. W. Rep. 774.

94. NEGLIGENCE — Injuries by Electric Wires.—In an action against an electric light company for injuries caused by an electric shock, there was evidence authorizing the jury to find that the injury was caused by a galvanized iron pipe, which plaintiff was, in the daytime, rightfully placing on a building coming in contact with a place on the electric wire running along the wall of, and into, such building, where the insulating material was worn off, and also evidence that plaintiff was not an expert, and did not know that an electric light wire would do any harm, or that electric light wires ran on the sides of buildings: Held, that the question of plaintiff's due care was for the jury.—GRIFFIN v. UNITED ELECTRIC LIGHT CO., Mass., 41 N. E. Rep. 675.

95. NEGLIGENCE—Question for Jury.—Where a city is notified of a leak in its water pipes whereby plaintiff's

cellar was flooded, the question whether they were negligent in locating and stopping the leak was for the jury.—RUMSEY V. CITY OF PHILADELPHIA, Penn., 32 Atl. Rep. 1133.

96. NEGLIGENCE—Race Grounds.—In an action on the case, the declaration averred that defendant conducted a horse race on its race course and thereto invited the public, that plaintiff attended and paid admission, and that defendant so carelessly and negligently kept the said race course that a horse drawing a vehicle ran unattended through the spectators and injured plaintiff: Held, that the declaration was demurrable because it did not show that the horse was under defendant's management or control, and did not show whether plaintiff, at the time of the accident, was in the space reserved for pedestrians or that reserved for vehicles.—HART V. WASHINGTON PARK CLUB, Ill., 41 N. E. Rep. 620.

97. NEGOTIABLE INSTRUMENT—Bills and Notes—Notice of Dishonor.—It is not essential that a notice of dishonor or of protest of a note should state in so many words that the holder looks to the indorser for payment, but a notice from which that fact may be reasonably inferred is sufficient. A copy of the note and of the protest sent to the indorser constitutes such a notice.—NELSON V. FIRST NATL. BANK OF KILLINGLEY, U. S. C. C. of App., 69 Fed. Rep. 798.

98. NEGOTIABLE INSTRUMENTS—Indorsement.—An indorsement of a "credit on the within note" on a certain date stating the amount in figures, and on the line below the same amount written out and stated again in figures, imports two credits of that amount.—MAYER'S EX'RS V. SCHLAMP, Ky., 32 S. W. Rep. 399.

99. NEGOTIABLE INSTRUMENTS—Insurance.—Defendant gave his note in payment of an insurance premium, receiving from the payee a contract which gave him a right to renew the note for three years. A second note was afterwards given in renewal of the first note, and prior to its maturity a third note was sent to the payee, who acknowledged its receipt, and promised to return the second note, but failed to do so, and such second note was, before its maturity, transferred to plaintiff, who had no knowledge of any contemplated fraud on the part of the payee: Held that, there being no illegality in the inception of the note, plaintiff was entitled to recover, though as between the original parties, such note could not be enforced.—FIRST NAT. BANK OF DUBUQUE V. GETZ, Iowa, 64 N. W. Rep. 799.

100. NEGOTIABLE INSTRUMENT—Note.—A parol agreement that a note given in payment for bank stock shall be paid for only out of the dividends on such stock, cannot be set up as a defense to an action on the note, since that would be an attempt to vary a written instrument by parol evidence.—MUMFORD V. TOLMAN, Ill., 41 N. E. Rep. 617.

101. NEGOTIABLE INSTRUMENT—Notes—Release of Indorsers.—Where an action on a note is not brought in time to hold indorsers thereon, they are not liable in such action, though they entered into an independent agreement of suretyship thereof.—TEXAS SAVINGS LOAN ASS'N V. SMITH, Tex., 32 S. W. Rep. 380.

102. PARLIAMENTARY LAW—Suspension of By-law.—A by-law of a board of education provided that no text-book should be adopted unless proposed at a regular meeting at least one month before its adoption. By-laws could be suspended by a two-thirds vote of the members present. A report recommending the adoption of a text-book was made, and a motion to lay the report on the table was lost by a two-thirds vote, after which the book was adopted by a majority vote: Held, that the by-law requiring a text-book to be proposed a month before its adoption was suspended by the loss, by the two-thirds vote, of the motion to lay the report on the table, thereby rendering the adoption of the text-book valid.—KENDALL V. BOARD OF EDUCATION OF CITY OF GRAND RAPIDS, Mich., 64 N. W. Rep. 745.

103. PARTITION—Sale.—Mill. & V. Code, § 4024, provides that any person entitled to partition is entitled to have the premises sold, when it would be for the advantage of the parties: Held, that upon the concurrent finding of the master and the chancellor that certain mountain land was principally valuable for its minerals and timber, and that the minerals and water were almost exclusively on one end of the tract, and that the minerals were undetermined in extent and value, it was proper to make a decree of sale.—WILSON V. BOGLE, Tenn., 32 S. W. Rep. 386.

104. PARTNERSHIP—Note of Partner.—Where a creditor of a firm, knowing of the partnership, accepts the individual note of one partner for the firm debt, it constitutes an election releasing the firm from the indebtedness.—WHITE V. RECH, Penn., 32 Atl. Rep. 1130.

105. PARTNERSHIP—Rights Inter Se.—One of several partners, who has paid certain partnership debts, for which all are liable, cannot maintain *assumpsit* against one of the other partners, to recover his share thereof, until there has been a settlement of the partnership accounts.—MURRAY V. HERRICK, Penn., 32 Atl. Rep. 1125.

106. PARTNERSHIP DEBT—Payment of Private Debts.—A loan of money to a person upon his own credit, for the purpose of enabling him to contribute his share of the capital in a firm, is not a partnership debt.—BANNISTER V. MILLER, N. J., 32 Atl. Rep. 1066.

107. PAYMENT TO AGENT—Proof of Authority.—Payment by a purchaser of goods to the seller's agent, who solicited and received the order for them, does not discharge the debt, in the absence of proof by the purchaser that the agent had any other authority than to make sales.—CLARK V. MURPHY, Mass., 41 N. E. Rep. 674.

108. PLEADING—Defect of Parties.—Where a married man sues alone for the value of the number of acres of land deficient in a tract conveyed to himself and wife, and it is agreed that defendant shall be allowed all competent defenses under a general denial, the objection that plaintiff's wife is not a party to the action will be waived if not taken by plea in abatement, the stipulation referring to defenses made.—MOORE V. HARMON, Ind., 41 N. E. Rep. 599.

109. PRINCIPAL AND AGENT—Authority.—The fact that an agent made a particular contract to dig a well is not of itself evidence that he had authority to hire a person to do the work.—MUNDIS V. EMIG, Penn., 32 Atl. Rep. 1135.

110. RAILROAD COMPANY—Accident.—In an action against a railroad company for injuries at a public crossing with a down-grade approach, an instruction that plaintiff was negligent if he approached the crossing with a heavy load, at a trot, though the gates were up, is properly refused where there is evidence that the gateman, by nodding to the plaintiff, invited him to cross.—CLARK V. BOSTON & M. R. R., Mass., 41 N. E. Rep. 666.

111. RAILROAD COMPANY—Accident.—Where there was evidence that no signal was given at a railroad crossing, and no witness was called to show that such signal was given, a verdict for plaintiff for the death of her intestate at such crossing will not be disturbed.—HAVERSTICK V. PENNSYLVANIA R. CO., Penn., 32 Atl. Rep. 1128.

112. RAILROAD COMPANIES—Accident—Presumptions.—Where there is evidence that one killed by a moving train could have seen it in time to have avoided the accident, the law will assume that he did actually so see it.—LAMPORT V. LAKE SHORE & M. S. R. CO., Ind., 41 N. E. Rep. 586.

113. RECEIVERS—Actions.—The receiver of a foreign mutual insurance company, appointed by a court of competent jurisdiction, may maintain an action to recover an assessment on a premium note given by a person residing in Wisconsin, and which was a part of the assets of the insolvent company in the hands of the receiver at the time the assessment was made.—PARKER V. STOUGHTON MILL CO., Wis., 64 N. W. Rep. 751.

114. RECEIVER—Appointment.—Where it was alleged, in an action to compel defendants to assign to plaint-

iff a certain lease to oil land in possession of defendants, that defendants were non-residents, and had only a small amount of property in the State, and it appeared that neither parties owned the land, but only claimed a leasehold right therein, the court was justified in appointing a receiver to take charge of and superintend the production of the oil.—GALLOWAY v. CAMPBELL, Ind., 41 N. E. Rep. 597.

115. SALE—Breach of Warranty.—On breach by a vendor of a guaranty that the horse has a pedigree qualifying it for registry in a trotting association, the vendee is entitled to recover, as damages, the difference in the value of the horse as she really was and her value if she was of the pedigree guarantied.—SHARPE v. BETTIS, Ky., 32 S. W. Rep. 395.

116. SALE—Insanity.—Where the validity of a sale by an insane person was at issue, and the jury were instructed that if there was a present consideration for the sale, and if the purchaser could not be put in the condition he was before the sale, it was valid, the verdict against the sale was not justified where there was evidence that, in consideration of the sale, the purchaser paid several debts of the seller.—BOKEMPER v. HAZEN, Iowa, 64 N. W. Rep. 773.

117. SALE—Rescission for Fraud.—The insolvency of a purchaser, and his knowledge of it when he makes the purchase, while not sufficient to invalidate the sale, are evidence to go to the jury with other facts to show the intended fraud.—CINCINNATI COOPERAGE CO. v. GAUL, Penn., 32 Atl. Rep. 1093.

118. SALE — Warranty — Damages.—The giving of a note for the price of a threshing machine, after a trial of it in threshing one kind of grain, is not a settlement for it "after having tried it," within the meaning of a clause, in the contract for its sale, providing that a settlement for it after having tried it estops the purchaser from all claims for damages for breach of warranty.—BRIGGS v. RUMELY CO., Iowa, 64 N. W. Rep. 784.

119. SALE OR MORTGAGE.—A contract (reserving title in the vendor) for the conditional sale of the stock and fixtures in a saloon, by which the purchaser agreed "to replace such of said property as is broken or destroyed, and to submit such substituted goods to the lien of this agreement," operates, as to the subsequently acquired goods, as a mortgage.— HUDSON v. MCKALE, Mich., 64 N. W. Rep. 727.

120. STATUTES—Enactment.— The constitutional requirements as to the mode and manner of enacting laws are mandatory, and where the journals kept by the two houses of the legislature are silent as to matters required to be entered upon them, or where they show affirmatively and explicitly that other constitutional requirements not directed to be entered on the journals have not been complied with in the enactment of a law, the journal evidence will control, and the act be declared void.—STATE v. GREEN, Fla., 18 South. Rep. 334.

121. SUNDAY LAW — Complaint.—A complaint for a violation of the Sunday law must affirmatively show that the act complained of was performed on Sunday. —GELBERT v. COMMONWEALTH, Penn., 32 Atl. Rep. 1091.

122. TENANCY IN COMMON — Rights Inter Se.—The terms of a contract of sale by which one cotenant of mining lands disposed of his interest, will not bind the others to accept the royalty therein reserved to the vendor as a fair measure of the value of their rights.—APPEAL OF STATE LINE & S. R. CO., Penn., 32 Atl. Rep. 1126.

123. TRESPASS — Change of County Road.—A landowner cannot recover in trespass for the change of a county road over his land where it appears that the change was made by the proper officers, under proper authority, and was for public good, and that plaintiff was merely inconvenienced thereby.—LAKENAN v. PROPHITT, Ark., 32 S. W. Rep. 384.

124. TRIAL — Adjournment.—Under Code, § 192, which provides that "courts must be held at the place provided by law, except for the determination of actions, special proceedings or other matters not requiring a jury, when they may, by consent of the parties therein, be held at some other place," a judge trying a case without a jury cannot, on granting defendant's motion for continuance conditionally, upon its allowing the testimony of the witness because of whose absence, from illness, defendant's motion was made, to be taken at that witness' house, adjourn to that place, and proceed with the trial.—FUNK v. CARROLL COUNTY, Iowa, 64 N. W. Rep. 768.

125. TRUST — Vested Rights.—Deceased conveyed land to plaintiff, as trustee; the deed providing that the grantee should sell the property within 10 months after the grantor's death, and divide the proceeds among his children, one of whom was plaintiff. The power of revoking the trust was expressly reserved: Held, that the instrument was a valid express trust, passing a present interest, subject to divestiture only by revocation, though the enjoyment of such interest was to commence in the future.—NICHOLS v. EMERY, Cal., 41 Pac. Rep. 1089.

126. TRUSTEE—Duties and Liabilities.—Where a testamentary trustee is required, by the terms of the will appointing him, to invest, by bond and mortgage in good, unincumbered real estate, a certain sum, the interest of which he is required to dispose of in a certain way, and, for the protection of the trust fund, is compelled to bid in at foreclosure sale a portion of the premises mortgaged to him, it is within his authority to execute an option contract for the sale of the property.—YERKES v. RICHARDS, Penn., 32 Atl. Rep. 1089.

127. VENDOR AND PURCHASER — Subsequently Acquired Title.—Where an agent of the State, authorized to select land in a particular county in lieu of school lands lost therein, by sale or otherwise, selects and conveys land in another county, a valid title to such lands subsequently acquired by the State will not inure to the benefit of the grantee.—SALEM IMP. CO. v. MCCOURT, Oreg., 41 Pac. Rep. 1105.

128. VENDOR'S LIEN—Reservation.—Where a vendor assigns notes secured by vendor's lien, reserving to himself the right to collect the unpaid interest, accrued and to accrue, the lien will adhere *pro tanto* to the amount reserved.—CHRISTOFF v. CHESLEY, Tex., 32 S. W. Rep. 366.

129. WILL—Construction.—Testatrix gave personalty to her son F, "to be held in trust, by the said daughter H and her husband B, for the support and maintenance of F. Anything remaining at his decease shall be equally divided among my three daughters." H died after testatrix; and F, after H: Held, that the trust property not used for the support of F should be distributed one-third to each of the two remaining daughters of testatrix, and one-third to the legal representatives of H.—BANCROFT v. FITCH, Mass., 41 N. E. Rep. 661.

130. WILLS—Construction — Illegitimate Children.—Testator devised property in trust for his children, the income of the share of a daughter to be paid for life, and at her death her share to go to such of her issue as she might by will appoint, and, in default of appointment, to such persons as would have been entitled to it had she been the absolute owner of it: Held that, her devise of it to a stranger being void, and she having made no other appointment, and having died unmarried, her illegitimate children inherited it; the act of 1855, enabling illegitimate children to inherit from their mother, having been passed before the death of their mother, though after the death of testator.—IN RE SEITZINGER'S ESTATE, Penn., 32 Atl. Rep. 1097.

131. WILLS—Construction — Payment of Legacy.—A will devised all testatrix's "real estate, personal property, and household effects" to her nephew, subject to a provision that he pay certain legacies: Held, that such legacies were a charge upon testatrix's entire estate.—CHASE v. WARNER, Mich., 64 N. W. Rep. 730.